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IN THE

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1974

THE HEARST CORPORATION and its Divisions, LOS ANGELES HERALD-EXAMINER and HILLBRO NEWSPAPER PRINTING COMPANY,

Petitioners,

vs.

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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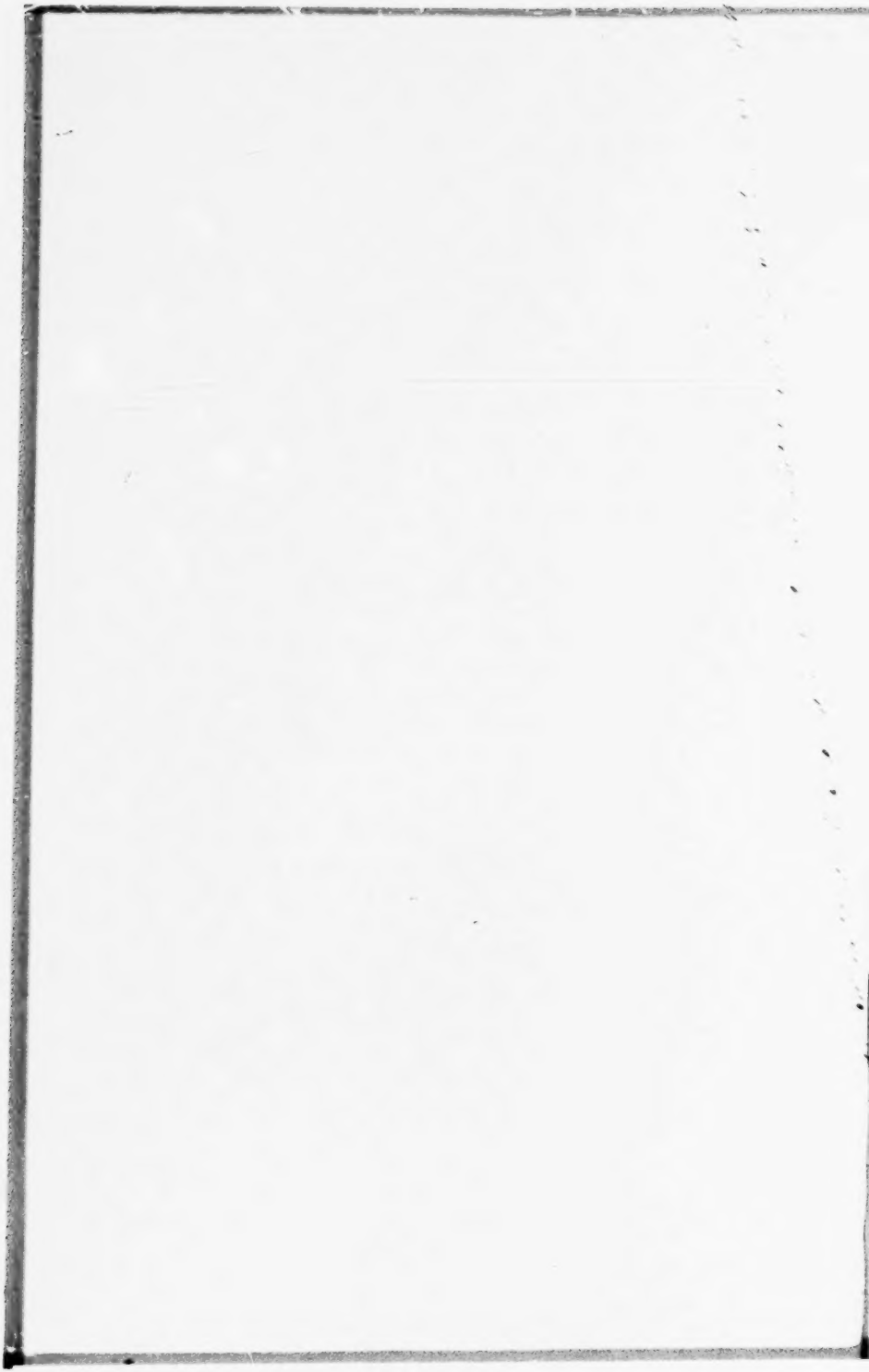

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the vacation of a labor arbitration award.

OPINIONS BELOW

The opinion of the court of appeals, reported at .... F. 2d ...., 87 L.R.R.M. 2597, is set forth in Appendix A hereto. The order of the court of appeals denying the petition for a rehearing in banc is set forth in Appendix B hereto. The opinion and order of the

district court, reported at 352 F. Supp. 1383, is set forth in Appendix C hereto. The arbitrator's findings and award is set forth in Appendix D hereto.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1974, affirming the vacation of the arbitration award. The court of appeals denied a timely petition for rehearing on November 12, 1974. This petition is, therefore, timely. 28 U.S.C. § 2101(c). *See e.g., United States v. Healy,* 376 U.S. 75, 77-80 (1964); *Department of Banking v. Pink,* 317 U.S. 264, 266 (1942). The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and in accordance with Supreme Court Rule 19.

QUESTIONS PRESENTED

1. Is a procedural defense to arbitration to be decided by the court, and not the arbitrator, where the parties' collective bargaining agreement does not expressly authorize the arbitrator to decide the procedural defense?

2. May an arbitration award sustaining a procedural defense be vacated because the arbitrator implied a term into the collective bargaining agreement while interpreting an ambiguous provision?

3. Where one party contests the arbitrability of a dispute, are the provisions of the collective bargaining agreement and the rules of the American Arbitration Association providing for unilateral initiation of arbitration and for issuance of an ex parte award invalid and ineffective?

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Preliminary Statement.

The arbitration award at issue was rendered on August 12, 1970. (App. D.) The arbitrator ruled that certain grievances filed by Respondent were not arbitrable because of the failure of Respondent to cause the appointment of an arbitrator within a reasonable period of time. (App. D at 29.)

On November 18, 1970, Respondent filed a petition to vacate the award in the Superior Court of the State of California for the County of Los Angeles. On November 25, 1970, Petitioners removed the action to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1441(b), invoking the jurisdiction of the district court under Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a).

The district court vacated the award and ordered the parties again to utilize the grievance procedure pro-

vided in their collective bargaining agreements* and, failing amicable settlement, to arbitrate the merits. The court of appeals affirmed the vacatur, but modified the district court's order to require Petitioners directly to arbitrate the merits of the grievances, thus depriving Petitioners of any procedural defenses.

Dispute Between the Parties.

The parties' Agreement expired on November 18, 1967. The grievance and arbitration provisions, Article VII of the Agreement (set forth in Appendix E hereto), had required arbitration of "all grievances arising under this Agreement," and further provided that if the "party adverse to the complaining party refuses for any reason to proceed to the selection of an arbitrator," the complaining party could have an arbitrator appointed unilaterally by the American Arbitration Association (hereinafter "AAA"), to whom the grievances would be submitted for "final decision." Article VII further specified that the AAA's voluntary labor arbitration rules providing for ex parte arbitration should govern. (App. E at 2.)

On March 27, 1968, Respondent filed its initial grievance under the expired Agreement.** It is undis-

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*There are two collective bargaining agreements; one each between Respondent and The Hearst Corporation's two divisions, the Los Angeles Herald-Examiner and the Hillbro Newspaper Printing Company. The agreements are identical in all respects relevant to this litigation. They are hereinafter collectively referred to as the "Agreement."

**This grievance involved certain employees' claims for payment of alternate benefits under Article XI of the expired Agreement. (App. D at 18.) Respondent subsequently filed additional grievances over dismissal pay under Article IV of the expired Agreement. (App. D at 16.) The foregoing grievances are hereinafter collectively referred to as "grievance."

puted that, if the Agreement were in effect, the grievance was timely filed.

On June 19 and August 5, 1968, Respondent demanded arbitration which Petitioners declined on the ground that the grievance both arose and was filed after the expiration of the Agreement. Over a year later, on August 13, 1969, Respondent again demanded arbitration which Petitioners again declined.

On October 3, 1969, 18 months after filing its initial grievance, Respondent finally exercised its unilateral right to have the AAA appoint an arbitrator, who, if necessary, would issue an ex parte award. Petitioners did not at any time cause or contribute to Respondent's 18-month delay, nor in fact was there anything Petitioners could do under the Agreement to preclude Respondent from timely submitting its grievance to ex parte arbitration. Indeed, Petitioners' explicit refusals to participate in an arbitration and its contention that the grievance was not arbitrable, rather than causing Respondent to delay for 18 months, instead immediately put Respondent on notice that if Respondent seriously wished to proceed to arbitration it should timely exercise its unilateral right to invoke the ex parte arbitration provisions of the Agreement. (App. D at 26-27.)

On October 8, 1969, the AAA appointed Thomas T. Roberts as arbitrator. Petitioners were then presented with a dilemma: Either participate in the arbitration, thereby waiving the right to later contend that the merits of the grievance were not arbitrable, or not appear, thereby risking under the AAA ex parte rule an adverse award which, notwithstanding Petitioners' contention, would probably be enforced. The

dilemma was further exacerbated because whatever the likelihood of prevailing on the merits, Petitioners believed that under the Agreement they had an excellent procedural defense to arbitration of the grievance because of Respondent's failure to cause the appointment of an arbitrator within a reasonable period of time. This procedural defense, under *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), Petitioners believed was solely for the arbitrator. A narrow exit from this dilemma was presented when Respondent agreed with the arbitrator's suggestion that the parties initially arbitrate the procedural issues, which they did. At the hearing, Petitioners stipulated that the Agreement was in effect, reserving their right to contend later that the merits of the grievance were not arbitrable.*

Decision and Award of the Arbitrator.

In his decision the arbitrator noted that submitted to him was "the narrow issue of whether or not [Respondent] sought the appointment of an arbitrator in a timely manner." (App. D at 22.) The arbitrator was aware that the "stakes" were high. However, under the Agreement he was bound to its provisions, one of which stated that " 'the time limits specified in this Article [VII] shall be observed unless amended, or extended, by mutual written agreement of the parties.' " (App. D at 23.) No extension had been agreed to in this case. After reviewing the time limits specified for each step of the grievance and arbitration procedure, he found that only the time for the unilateral appointment of an arbitrator by the complaining party was unspecified even though Petitioners had contended that it was clearly required within 60 days. However, he also

*During the hearing on February 3, 1970, the parties arranged subsequent dates for further hearings on the merits.

rejected Respondent's contention that the Agreement's silence on the point manifested the parties' intent to create a right which could be exercised by Respondent in perpetuity. Rather, the arbitrator considered the parties' practice during the Agreement's term of selecting an arbitrator for all grievances within 60 days of the demand for arbitration, interpreted the Agreement and concluded that the unilateral right to proceed to arbitration "constitutes an integral part of a carefully defined system which contemplates a timely movement of grievances to arbitration" and that this right must be exercised by the party desiring arbitration within a reasonable time. (App. D at 24.) The arbitrator then reviewed the facts of the case, found that, under the Agreement, Petitioners could not thwart the appointment of an arbitrator or the holding of an arbitration, and concluded that Respondent by delaying one and one half years did not exercise its right within a reasonable time. This ruling foreclosed an arbitration of the merits.

Decision of the District Court.

In vacating the arbitrator's award, the district court acknowledged that *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964), requires that the arbitrator, rather than the court, decide whether the procedural prerequisites to arbitration under the Agreement have been met. (App. C at 3.) This is what the arbitrator in fact did. But the court was concerned that, since arbitration was Respondent's exclusive remedy, failure to vacate the procedural award would deprive Respondent of any opportunity to litigate the merits of its grievance (App. C at 3-4), a result which regularly occurs whenever a court sustains a statute of limitations defense. To avoid this result, the court reasoned as follows:

Wiley prohibits "compulsory" arbitration absent a judicial determination of arbitrability; since the Agreement's provision for unilateral initiation of arbitration, is "compulsory," that provision may not be employed until a court determines that the arbitration provisions of the Agreement are in effect. Here the arbitration provisions were and are in effect; but that determination cannot now save the earlier arbitration award, which must therefore be vacated. The district court held that a prior judicial determination of arbitrability is a prerequisite to a valid ex parte arbitration award whenever arbitrability is challenged and ordered the parties to again process the grievance.

Decision of the Court of Appeals.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. Judge Moore,* writing for the panel, which included Judges Wright and Goodwin, affirmed the district court's vacation of the award, with the modification that Petitioners proceed directly to arbitrate the merits of the grievance, thus depriving Petitioners of any procedural defenses.

The court held in part, that despite the fact that the procedural defense of Respondent's unreasonable delay in causing his appointment was the issue submitted to the arbitrator, the award is of no effect because the procedural defense was not the grievance contemplated by the Agreement. (App. A at 12.) Thus, notwithstanding the fact that the proceeding before it was a petition to vacate an award rather than a petition to compel arbitration, the court broadly perceived a ju-

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*Senior United States Circuit Judge, United States Court of Appeals for the Second District, sitting by designation.

dicial responsibility "to oversee the arbitral process to ensure the parties receive the arbitration they bargained for." (App. A at 13.) The court concluded that the procedural defense was itself "a matter quite *dehors* the agreement" (App. A at 14) and therefore the arbitrator had no business deciding it, particularly where his decision precluded arbitration of the merits of the grievance—the only arbitration the court believes the parties "bargained for."

The court also held that even if the Petitioners' procedural defense were a "grievance" subject to arbitration under the Agreement, the instant award is a product of the arbitrator creating "a quasi statute of limitations not in the agreement," by construing the Agreement to imply a requirement that an arbitrator be appointed within a reasonable period of time. (App. A at 9.) The court, by ordering arbitration of the merits, decided the procedural defense de novo, contrary to the arbitrator.

Finally, the court approved the district court's conclusion that where arbitrability is contested unilateral arbitration is invalid and ineffective without a prior judicial determination of arbitrability. (App. A at 11.)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts in Principle With John Wiley & Sons v. Livingston, 376 U.S. 543, Which Holds That Procedural Defenses Are to Be Decided Exclusively by the Arbitrator.

In *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957) the Court held that Section 301(a) of the Labor Management Relations Act authorized federal courts to fashion a uniform body of federal common labor law. A vital part of this substantive law was then

set forth by the Court in the "*Steelworkers Trilogy*"* where the Court, in delineating the respective roles of judicial and arbitral authority in the private arbitration process, enunciated the national policy favoring arbitration for the settlement of disputes and concurrently limited the function of the courts. This policy favoring arbitration has been consistently reaffirmed. *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 377-80 (1974); *I.U.O.E. Local 150 v. Flair Builders, Inc.,* 406 U.S. 487 (1972); *Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970); *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964). Once it is determined the merits of a dispute are arbitrable, the role of the courts terminates. *John Wiley & Sons v. Livingston, supra.*

In *Wiley,* a petition to compel arbitration, the employer rejected the very existence of the collective bargaining agreement and the attendant contractual duty to arbitrate the grievances filed by the union. The employer also maintained that even if the subject matter of the grievances were arbitrable, the union, by its delay in seeking arbitration, had not complied with the procedural prerequisites to arbitration under the agreement. The Court held that the subject matter of the grievances was arbitrable and, more importantly, that the " 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator," not the courts. 376 U.S. at 557.

Unlike *Wiley,* the present case arose out of a petition to vacate an arbitration award and after the arbitrator's resolution of the procedural question foreclosed

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**United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

a decision on the merits. The court of appeals overturned that result and held that despite the fact that the merits of the grievance were and are arbitrable, the arbitrator could not decide the procedural defense because that issue was not the "grievance" for which arbitration was contemplated under the Agreement. (App. A at 12.) In reaching this conclusion, the decision made no mention and accordingly gave no consideration to *Wiley;* nor could it, because the principle enunciated in *Wiley* is directly in conflict with the court's reasoning.

This Court has never answered the often occurring specific question of whether it is the arbitrator, rather than a court, who decides the procedural defense of the timeliness of the resort to arbitration where in their collective bargaining agreement the parties have not expressly agreed to arbitrate that specific procedural defense, but have agreed to arbitrate the merits. Within the last three years the Court granted *certiorari* on this precise question in *I.U.O.E. Local 150 v. Flair Builders, Inc.,* 406 U.S. 487 (1972), but in deciding the case the Court expressly refrained from reaching the question. 406 U.S. at 490-91. In *Flair,* the Court held that where the collective bargaining agreement provided for arbitration of "any difference" between the parties, the parties *had* agreed to arbitrate the issue of whether the union's delay in seeking arbitration constituted laches barring arbitration and, therefore, the issue was for the arbitrator, not the courts. In the present case the court of appeals concluded that, unlike *Flair,* the language providing for arbitration of "all grievances arising under this Agreement" did not include an express agreement to arbitrate the procedural defense of Respondent's unreasonable delay and failure to comply with the time limitations of the Agreement.

Thus, the instant case squarely presents to the Court for the second time the important legal question presented but not decided in *Flair*. The undefined phrase "all grievances" in the parties' Agreement admittedly is not as broad as the language "any difference" interpreted by the Court in *Flair* as including an express agreement to arbitrate the issue of laches. Moreover, the grievance herein involved the payment of alternate benefits and dismissal pay to certain employees, and Petitioners' defense to arbitration of this grievance was that Respondent did not timely exercise its clear right to request the appointment of an arbitrator. This defense was not a "grievance" nor could it be construed as one since it dealt with an issue of procedural arbitrability which could arise only after the grievance was filed. The Agreement did not expressly state that the arbitrator determines procedural defenses to arbitration. However, since this procedural defense did "grow out of the dispute and bear[s] on its final disposition," the final disposition of this procedural defense "should [have been] left to the arbitrator" under this Court's ruling in *Wiley*. 376 U.S. at 557.

The court below not only negated the arbitrator's authority to decide the procedural defense, the court itself proceeded to decide it contrary to the arbitrator. This unwarranted extension of the judiciary's role into the arbitration process is erroneous and conflicts with the principle of law enunciated in *Wiley*. Furthermore, the question whether an arbitrator, and not a court, decides procedural defenses to arbitration where the collective bargaining agreement is silent, is an important federal question which has not been, but should be decided by this Court, as evidenced by the fact that *certiorari* was initially granted in *Flair* to decide this precise question.

2. The Decision Below Conflicts in Principle With a Prior Decision of This Court and Directly Conflicts With Decisions of the Various Circuits Which Hold That an Arbitration Award May Not Be Vacated so Long as It Draws Its Essence From the Collective Bargaining Agreement.

A. The Decision Below Conflicts in Principle With United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, Which Holds That an Arbitration Award Disposing of the Merits of a Dispute May Not Be Vacated by a Court so Long as It Draws Its Essence From the Collective Bargaining Agreement.

In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the one *Trilogy* case involving a petition to enforce an award, the Court dealt specifically with the standard for judicial review of arbitration awards:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." 363 U.S. at 596.
>
> "...
>
> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." 363 U.S. at 599.

Thus, an arbitrator's award should not be vacated "*so long as it draws its essence from the collective bargaining agreement.*" 363 U.S. at 597.

The decision below, after noting Petitioners' argument that arbitration awards are subject to limited ju-

dicial review, rejects the argument, and concludes that the award is "quite unsupported by the facts" and "[t]he record discloses no facts upon which a claim of lack of timeliness can be sustained. . . ." (App. A at 12, 14.) This plenary judicial review is directly in conflict with the principle in *Enterprise*. In passing on the validity of the award the decision below does not even cite *Enterprise;* no attempt is made to try to reconcile the result reached within the *Enterprise* standard, nor could such an attempt be successful. Rather, the decision broadly perceives the court's duty as "oversee[ing] the arbitral process to ensure the parties receive the arbitration they bargained for" (App. A at 13), and under this banner proceeds to give a full fledged review to the award. Thus while no issue of fact relevant to a determination of Petitioners' procedural defense was in dispute, i.e., the conduct of the parties, their past practice, the terms of the Agreement, or Respondent's one and one half year's delay, the decision below rejects the arbitrator's determination and makes its own contrary determination.

The decision below not only fails to limit judicial inquiry to the basic question of whether the award "draws its essence" from the Agreement, but fails even to address this basic question. Instead, the decision, without considering the arbitrator's reasoning or the degree to which his award is based upon his interpretation of the Agreement, mischaracterizes the award as creating a statute of limitations not in the Agreement and twice states that the award is not supported by the facts. (App. A at 12, 14.)

The facts of this case, however, show that the arbitrator clearly articulated both his reasoning and his

interpretation of the Agreement, and the factual basis for his conclusions. (App. D at 22-29.) There is no dispute as to what the arbitrator did in this case. He expressly found that the Agreement was silent on the question of the time limit within which an arbitrator must be sought by the complaining party. Given this contractual silence, the arbitrator concluded that it was his duty to interpret the Agreement in light of its relevant provisions and the custom of the shop. (App. D at 24.) Accordingly, the arbitrator concluded that the parties intended to construct a contract procedure which would speedily move grievances to arbitration by allowing unilateral initiation of arbitration and ex parte arbitration, thus preventing one party from frustrating the arbitration process by refusing, on whatever grounds, to participate. Based upon his interpretation of both the language and the parties' intent, and given the Agreement's silence on the time period in which ex parte arbitration must be sought, the arbitrator proceeded to imply into the collective bargaining agreement the requirement that arbitration be sought within "a reasonable period of time."* (App. D at 25.) Thus, the arbitrator's opinion clearly supports the conclusion that his award was based upon—"draws its essence from"—the Agreement.

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*The arbitration proceeding can be summarized as follows. Respondent took the position that the event giving rise to the grievance was Petitioners' March 12, 1968, refusal to pay and that the written notice of the grievance required by Section 2 of Article VII (App. E) was satisfied by Respondent's letter of March 27, 1968. Section 3 requires that grievances raised under Section 2 must be resolved, dismissed or submitted to arbitration within 60 working days following receipt of the Section 2 notice. Respondent intentionally furnished its demand to arbitrate on June 19, 1968, exactly the 59th working day from March 27, 1968, the Section 2 notice of the grievance. According to Respondent's theory, it had complied with

(This footnote is continued on next page)

Contrary to the court below, the arbitrator on the facts before him found that Respondent, by its 18-month delay, did not act within a reasonable period of time. More importantly, and also directly contrary to the court below, the arbitrator expressly found that "*nothing* in the record lends the slightest support to the charge . . . that [Petitioners were] somehow guilty of 'thwarting' [Respondent's] desire to arbitrate, or that [Petitioners] otherwise contributed to the delay." (App. D at 27.) (Emphasis supplied.) Thus, the arbitrator, unlike the court, did precisely what he was entitled to do under *Enterprise*, and his award should not have been vacated.

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all the time limits of Article VII, and could thereafter unilaterally proceed to the selection of an arbitrator at its leisure or never.

Petitioners showed that during the two-year term of the Agreement for all of the grievances upon which Respondent demanded arbitration, an arbitrator was selected within 60 working days of the demand. (App. D at 25) Petitioners advanced several theories on why Respondent's actions had not complied with the time limits of Section 3, and alternatively, that if Section 3 set forth no time limits, the appointment of an arbitrator was required within a reasonable period of time.

The arbitrator in his award reviewed the Agreement and disagreed with Respondent's interpretation. Reading Section 3, he concluded that all of the language and time limits therein cannot be complied with or harmonized when one party files its demand for arbitration on the 59th working day as did Respondent. Thus, the arbitrator found it necessary to interpret that section based upon a reading of the entire Article VII and specifically upon the time limits created for all the other steps in the arbitration procedure. He noted that during the term of the Agreement, the past practice of the parties had in each and every grievance resulted in the selection of an arbitrator within 60 working days. Drawing all of these factors together and bringing to bear his experience with the "custom of the shop," he concluded that the selection of an arbitrator must be done in a reasonable period of time and that Respondent's 18-month delay was not reasonable. (App. D at 22-29.)

B. The Decision Below Is in Direct Conflict With Decisions of the Sixth and Seventh Circuits Which Hold That the Enterprise Standard of Limited Judicial Review Is Applicable to a Procedural Arbitration Award as Well as to an Award Disposing of the Merits of a Dispute.

The court below was faced with a *procedural* arbitration award which foreclosed arbitration of the merits of the grievance. Because the court gave plenary review to the arbitrator's award and vacated it without articulating any limitation on its scope of review, the decision must be read as holding that the *Enterprise* standard does not apply to procedural awards.* Thus, referring to the cases cited by both parties on the proper scope of judicial review, the court noted:

> "Most of them stand for the proposition that arbitration is to be favored for a solution of labor disputes as indeed it should be *if the subject matter of the disputes is put fairly before the arbitrator.*" (App. A at 14.) (Emphasis added.)

A holding that judicial review of procedural arbitration awards is unfettered by *Enterprise* is a radical departure from that decision without precedent in any circuit; it is, moreover, in direct conflict with decisions of the Sixth and Seventh Circuits.

In *Yellow Cab Co. v. Democratic Union Organizing Committee, Local 777,* 398 F.2d 735 (7th Cir. 1968),

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*This limitation on *Enterprise* was again suggested by the Ninth Circuit in *Rossi v. Trans World Airlines, Inc.,* No. 73-1458, ... F.2d .... (9th Cir. Nov. 27, 1974), decided only 15 days after the denial of a rehearing in the instant case. A copy of the decision is attached hereto as Appendix F. In upholding a labor arbitration award, the court in *Rossi, supra,* noted that when the arbitration board decided that the grievant's discharge was justified, "it decided his case on its merits, not on a procedural technicality. Therefore, so long as that decision was based on [the parties'] agreement, it is not subject to our review." (App. F at 2.) Judge Goodwin, who was on the panel in *Rossi* was also on the panel in the instant case.

the Seventh Circuit held without equivocation that an arbitrator's resolution of the procedural defense of timeliness "is subject to the limited standard of review annunciated in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*" 398 F.2d at 737.

To the same effect was the Sixth Circuit's decision in *Chambers v. Beaunit Corp.*, 404 F.2d 128 (6th Cir. 1968). In *Chambers*, arbitration on the merits was foreclosed by an arbitral decision sustaining the procedural defense that the grievance had not been timely filed. The court, refusing to give plenary review to the procedural award, cited and applied the *Enterprise* standard:

> "Only in those limited instances in which the arbitrator exceeds the authority granted him and makes an award which does not '[draw] its essence from the collective bargaining agreement' may a court refuse enforcement of the award." 404 F.2d at 131.

The Ninth Circuit's plenary judicial review of the procedural arbitration award in the present case is in direct conflict with the above decisions of the Sixth and Seventh Circuits which correctly apply the *Enterprise* standard of limited judicial review to arbitration awards resolving procedural questions of timeliness.

C. The Decision Below Is in Direct Conflict With Decisions of the First, Third, Seventh, and Tenth Circuits Which Hold That an Award Draws Its Essence From the Collective Bargaining Agreement Even Though the Arbitrator Implies a Term Into the Agreement When Interpreting It.

The decision below affirms the vacation of the arbitrator's award because the arbitrator, in interpreting the Agreement as requiring the complaining party to seek the appointment of an arbitrator within a reason-

able time, created "a quasi-statute of limitations not in the agreement" (App. A at 9) and because the procedural defense he decided was itself "a matter quite *dehors* the agreement." (App. A at 14.) Even if the decision can be read as purporting to apply a standard of limited judicial review, the decision amounts to a ruling that an award cannot "[draw] its essence from the collective bargaining agreement" within the meaning of *Enterprise* where the arbitrator implies a term into the agreement.

Only the Second Circuit has held that an arbitration award should be vacated if the arbitrator, when construing the agreement, implies a term into it, *Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677 (2d Cir. 1966), and *Torrington* itself is of doubtful continued validity in the Second Circuit. *F & M Schaefer Brewing Co. v. International Union of United Brewery Workers, Local 49*, 420 F.2d 854, 856 (2d Cir. 1970); *United Rubber Workers, Local 135 v. Dunlop Tire & Rubber Corp.*, 391 F.2d 897, 900 (2d Cir. 1968).*

Moreover, in *Peerless Pressed Metal Corp. v. I.U.E.*, 451 F.2d 19 (1st Cir. 1971), the company sought to enjoin arbitration of the question whether a laid off supervisor with prior seniority in the bargaining unit retained such seniority for purposes of reinstatement in the bargaining unit. The parties' agreement expressly included "employees" and excluded "supervisors" from its coverage. Arbitration was ordered because an arbitrator could imply the term that for purposes of seniority a "supervisor" was an "employee." In the subse-

*Judge Moore, the author of the decision below in the present case, separately concurred in *United Rubber Workers, Local 135 v. Dunlop Tire & Rubber Corp.*, 391 F.2d 897 (2d Cir. 1968), and felt compelled to cite *Torrington* and assert that its principle remained valid. 391 F.2d at 900.

quent arbitration the arbitrator so found. The company then petitioned to vacate the award claiming that the arbitrator had exceeded his authority by going beyond the express terms of the agreement. The First Circuit upheld the award. *I.U.E. v. Peerless Pressed Metals Corp.*, 489 F.2d 768 (1st Cir.) *cert. denied*, 414 U.S. 1022 (1973).

Similarly, in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969), only two employees bid for a promotion. Under the express terms of the collective bargaining agreement both employees were clearly ineligible to bid for the promotion. The company promoted the less senior employee. The agreement was silent as to whom, between two ineligible bidders, a promotion should be awarded. The arbitrator referred to other portions of the agreement, particularly the seniority provisions, which were not expressly made applicable to the factual situation presented, in order to ascertain the parties' intent. He gave effect to that intent in his award by sustaining the grievance and ordering the company to promote the more senior employee. The Third Circuit enforced the award, stating:

> "[W]e hold that a labor arbitrator's award *does* 'draw its essence from the collective bargaining agreement' *if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention;* only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award." 405 F.2d at 1128. (Emphasis supplied.)

In the present case, the manner in which the arbitrator interpreted the parties' Agreement is identical to that in *Ludwig*. Thus, while the Agreement was silent, the arbitrator referred to other relevant portions of the Agreement to ascertain the intent of the parties and, as in *Ludwig*, "his interpretation gave a reasonable and effective meaning to the manifestations of the intention of the parties considered against the backdrop of practices of industry and the shop." 405 F.2d at 1133.

In *Yellow Cab Co. v. Democratic Union Organizing Committee, Local 777*, 398 F.2d 735 (7th Cir. 1968), the company contended that the union had not complied with the contractual requirement that grievances be submitted in writing and requests for arbitration be submitted within 20 days after the company's adverse decision on a grievance. The arbitrator interpreted the agreement to imply the requirement that the 20 days limitations period be measured from the date of the last discussion of the grievance with the union, and not from the date of the company's adverse decision. The Seventh Circuit enforced the award.

In *Amalgamated Butcher Workmen Local 641 v. Capitol Packing Co.*, 413 F.2d 668 (10th Cir. 1969), the Tenth Circuit enforced an arbitrator's award which implied a term requiring the employer to pay pro rata vacation pay upon a plant closure despite the fact that the parties agreed not to include, and did not include, the pro rata vacation pay provision of their previous contract in their present contract.

The result of the decision below is that parties will be presented with the impossible task of specifying in precise detail in their collective bargaining agreements

each and every contingency, foreseen or unforeseen, that might arise during an agreement's term. The decision so restricts arbitrators in performing their function of construing collective bargaining agreements that the only "disputes" for which an award is safe from judicial vacation are those for which the contractual language provides a clear resolution. However, where the language is that clear, "disputes" hardly will ever reach arbitration. Rather, it is precisely in the resolution of the inevitable ambiguities and unforeseen contingencies that the arbitrator plays a crucial and important role. See *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 378 (1974). The ruling below is erroneous and conflicts directly with the foregoing cases which have permitted arbitrators, through interpretation, to imply a provision into a collective bargaining agreement.

3. The Decision Below Frustrates the National Labor Policy of Favoring Arbitration as the Method for Settling Industrial Disputes Because It Nullifies Ex Parte Arbitration.

In accordance with the principles of the *Steelworkers Trilogy** and its progeny favoring arbitration as the most inexpensive and expeditious procedure for the resolution of industrial disputes, private parties have advanced this national labor policy by providing for ex parte arbitration. Many collective bargaining agreements incorporate by reference the *Voluntary Labor Arbitration Rules of the American Arbitration Associa-*

**United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960). See also, *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 377-80 (1974).

tion or the Federal Mediation and Conciliation Service regulations relating to arbitration procedures, both of which provide for ex parte arbitration.*

The most frequent reason a party refuses to arbitrate is his belief that the particular claim is not substantively arbitrable—i.e., he never agreed to arbitrate it. Absent ex parte arbitration provisions, a complainant when faced with this assertion, must obtain a court order compelling arbitration. This procedure necessarily delays the arbitral process. On the other hand, where there are contractual provisions for ex parte arbitration, it is the recalcitrant party who has the burden of choosing a course of action; either participate in the arbitration, raising whatever defense, procedural or otherwise he might have, or not participate. If the arbitrator's award is favorable to the recalcitrant party the matter would in most cases end. If it is not favorable, a court would still be able subsequently to determine whether the matter was substantively arbitrable. Thus, the complainant receives his desired quick and relatively inexpensive arbitral decision, while a judicial determination of arbitrarily results only when absolutely necessary after the award has been rendered. Moreover, in this single judicial proceeding, both substantive arbitrability and the validity of the award under the *Enterprise* standard could be determined whereas two judicial proceedings, a petition to compel and a petition to vacate or enforce, ordinarily would have resulted. *See, e.g., Peerless Pressed Metals Corp. v. I.U.E.*, 451 F.2d 19 (1st Cir. 1971) (petition to compel) and *I.U.E. v. Peerless Pressed Metals Corp.*, 489 F.2d 768 (1st

**Voluntary Labor Arbitration Rules of the American Arbitration Association*, Rules 12, 13 and 27, *cited in* 43 Lab. Arb. 1292, 93-94; Federal Mediation and Conciliation Service regulations, 29 C.F.R. §§ 1404.7(a) and 1404.8.

Cir.), *cert. denied,* 414 U.S. 1022 (1973) (petition to vacate).

The decision below cannot be limited to the facts of this case. Rather, the decision nullifies ex parte arbitration provisions in every case where one party contests arbitrability—the most often occurring case and the one where the parties most intended such provisions to apply. Thus, the district court below held:

> "Since Hearst contended that the subject matter of the underlying dispute was not properly arbitrable, until that issue was resolved either judicially or by mutual agreement, the Guild was precluded from unilateral initiation of arbitration pursuant to Article VII § 3(b) of the collective bargaining agreements. As the language of *Wiley* suggests, the duty to arbitrate is created by contractual agreement. Hearst's position was that it had no duty to arbitrate under the collective bargaining agreements with the Guild. If no contractual duty to arbitrate exists, then provisions for unilateral initiation of arbitration are meaningless. Hearst could not have been forced by the unilateral initiation provisions to arbitrate that which it had no contractual duty to arbitrate." (App. C at 6.)

The court of appeals expressly affirmed this holding. (App. A at 11.)

The result of the decision below is that a prior judicial determination of arbitrability is a prerequisite to a valid ex parte arbitration award whenever arbitrability is challenged, no matter which party ultimately prevails. The decision below is wrong as a matter of policy because it nullifies the ex parte arbitration award

procedure thereby eliminating its salutary effects on the parties and on the private arbitration process of encouraging the parties to arbitrate.* Unless reversed, the decision below inevitably will result in the filing of far more petitions to compel arbitration in order to assure an award's validity. Those parties having grievances whose collective bargaining agreements now provide for ex parte arbitration, and who desire a valid award, will refuse to use those provisions whenever arbitrability is challenged, and accordingly will file petitions to compel arbitration. This result is contrary to the parties' intent and frustrates the national policy favoring arbitration.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 6, 1975

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*See *Meat Cutters v. Penobscot Poultry Co.*, 200 F. Supp. 879 (D.C. Me. 1961) (Gignoux, J.). See also, *Boot Workers, Local 149 v. Faith Shoe Co.*, 201 F. Supp. 234 (M.D. Pa. 1962); F. Elkouri & E. Elkouri, *How Arbitration Works*, 205-08 (3d Ed. 1973).

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN THE MATTER OF ARBITRATION BETWEEN LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, *Petitioner-Appellee,*	)	
vs.	)	No. 73-1742
THE HEARST CORPORATION, a corporation, Los Angeles Herald-Examiner, a Division of The Hearst Corporation, and Hillbro Newspaper Printing Company, a Division of The Hearst Corporation, *Respondents-Appellants.*	)	OPINION
LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, et al., *Plaintiffs-Appellants,*	)	
vs.	)	No. 73-1838
THE HEARST CORPORATION, a corporation, *Defendant-Appellee.*	)	

[October 4, 1974]

Appeal from the United States District Court for the Central District of California

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Before: MOORE,* WRIGHT and GOODWIN, Circuit Judges.

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*The Honorable Leonard P. Moore, Senior United States Circuit Judge, United States Court of Appeals for the Second District, sitting by designation.

MOORE, Circuit Judge:

Two appeals are presently before us. They involve the same subject matter, they arise out of the same facts and the opinions were written and judgments were directed to be entered by the same district judge (Hon. Robert J. Kelleher). The appeals will be considered and decided together.

The parties in "IN THE MATTER OF ARBITRATION BETWEEN LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, Petitioner-Appellee v. THE HEARST CORPORATION, a corporation, Los Angeles Herald-Examiner, a Division of The Hearst Corporation, and Hillbro Newspaper Printing Company, a Division of The Hearst Corporation, Respondents-Appellants" (No. 73-1742) are a group of employees of The Hearst Corporation or their beneficiaries represented collectively by Petitioner-Appellee, which will hereinafter be referred to as the "Guild." The Hearst Corporation, Respondents-Appellants, and its Divisions, publish, print and circulate a daily and Sunday newspaper, THE HERALD-EXAMINER, and will be referred to hereinafter as "Hearst."

The parties in "LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, et al., Plaintiffs-Appellants v. THE HEARST CORPORATION, a corporation, Defendant-Appellee" (No. 73-1838) are likewise the Guild and Hearst.

The controversies stem from the rights, if any, of Hearst and the Hearst employees under two collective

bargaining agreements, which had been entered into on or about January 28, 1966, by the Guild on behalf of the Hearst employees and Hearst. The agreements provided for wages, hours, working conditions, etc., covering the employees' employment. These agreements were but a continuation of similar employment agreements, containing comparable benefits, under which many of the employees had worked for a substantial number of years.

Two provisions of the agreement relating to compensation are critical to any decision adjudicating the employees' rights thereunder. Article XI, entitled "Alternate Benefits" declared that an employee, upon reaching the age of sixty-five (65), or upon the completion of twenty-five (25) years of service, would become entitled to receive from Hearst a cash lump sum payment based upon the numbers of years of his service to Hearst in accordance with a certain schedule set forth therein. To receive these payments, the employees, so desiring them, had to tender their resignations and request payment. Article IV, entitled "Dismissal Pay" (somewhat of a misnomer) provided for a cash lump sum payment to the beneficiary of any employee who died after more than six (6) months of service, the amount to be dependent on the period of service as set forth in a schedule in said Article.

No ambiguity is to be found in the terms of these Articles or in the prerequisites necessary to obtain the agreed-upon payments. To Hearst and the employees they were as much a part of wages as the weekly or monthly stipend. The following facts had to be shown for entitlement under Article XI. (1) age sixty-five

years (65) or over or twenty-years (25) years or more of service, (2) resignation tender, and (3) request for payment; under Article IV, two facts (1) death and (2) six (6) months or more of service. Just at there is no ambiguity in terms, there should be no ambiguity as to performance. However, commencing in the Fall of 1967, a series of events caused this otherwise stable situation to suddenly be turned into a controversy which in bitterness and duration bids fair to rivalling the War of the Roses. For some seven years the war has raged but thus far only in a series of legal skirmishes, none of which has attacked the main issue, i.e., the rights, if any, of the employees and Hearst under the agreements. It may seem quite incongruous after seven years for the courts now to say that it is high time to resolve this issue expeditiously and with finality but since courts have been created for this purpose they should so act when the issue is presented in proper form.

A few background facts will suffice. In September 1967 the Guild notified Hearst and state and federal mediation services that it intended to terminate or modify the existing agreements which expired on December 15, 1967. In October 1967 negotiations for a new agreement[1] commenced. As of yet, however, no settlement has been reached. No agreement having been reached by December 15, 1967, the Guild called a strike against Hearst, which has continued to date. However, the last seven years have not been uneventful for Hearst and the Guild.

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[1]Reference is occasionally made to "agreement" and to "agreements." Those words apply to the agreement which existed between Hearst, its employees and the Guild, covering the employees' employment and Hearst's obligations to them, and which defines the rights of the parties now before this Court.

Subsequent to December 15, 1967, employees who had reached the age of sixty-five (65) or had completed twenty-five (25) years of service, tendered their resignations and requested the payments specified in the agreements, the beneficiaries of deceased employees also requested the provided-for payments. To these requests Hearst replied that the agreements were no longer in effect and accordingly rejected them, and refused to make the specified payments. Then followed a protracted series of meetings between Hearst and the Guild to discuss the matter with Hearst remaining adamant in its position that the agreements no longer applied.

At this stage must be discussed Article VII of the agreements which provides for amicable settlement (a hoped-for desideratum) of "all grievances arising under this Agreement" (Article VII, SECTION 1). For this purpose, Grievance Committees were to be established by both the Guild and Hearst, certain formalities for the submission of grievances were set forth and in the event that arbitration was requested "the parties shall meet to select an arbitrator to whom the grievance of the complaining party shall be submitted for final decision." (Article VII, Section 3A).

Of particular significance to the litigations before us is the following paragraph:

> B. If such an arbitrator is not selected, or the party adverse to the complaining party refuses for any reason to proceed to the selection of an arbitrator, or if for any other reason an arbitrator is not selected or secured within the aforesaid five (5) day period, then the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an

arbitrator pursuant to the present rules of the voluntary labor arbitration tribunal of the American Arbitration Association, and the grievance shall be submitted to such arbitrator for final decision.

Although meetings between the Guild and Hearst were held during the Spring of 1968, Hearst did not alter its position that the agreements were not in effect. Finally, on June 19, 1968, the Guild by letter demanded arbitration "of the grievances raised by its letter of March 27, 1968, relating to Hearst's refusal to pay alternate benefits" and requested by letter a meeting to select an arbitrator. This demand for arbitration was rejected by Hearst on the specific ground "that it arises out of events subsequent to the expiration of the Guild's collective bargaining agreement . . ." Thereafter, the Guild continued to submit grievances because of Hearst's refusal to pay and continued to demand arbitration. Hearst's rejection of both demands was based upon the same grounds above specified.

At this point must be mentioned a diversionary maneuver in which the employees and the Guild engaged. Apparently feeling thwarted in their efforts to obtain payments from Hearst, they turned to the State Labor Commissioner, Division of Labor Law Enforcement of the State of California, by assigning to the State for collection their claims against Hearst. Hearings on the claims were held in the Fall and Winter of 1968 at which Hearst maintained its position that the agreements were no longer in effect.

The Commissioner found that Hearst owed the sums claimed and demanded payment of Hearst. Unable to collect from Hearst, the Commissioner attempted to

file a criminal complaint against Hearst through the City Attorney of Los Angeles. The City Attorney refused to issue a criminal complaint because a contract issue was involved, and the Labor Commissioner, asserting that the claimants had a contract remedy through arbitration, refused to pursue a civil action. Thus, more than six months of time were wasted, and the claimants were still without their benefits.

All during this period (1968-1969) negotiations (so-called) were taking place between Hearst and the Guild, at which the Guild demanded payment and arbitration and Hearst rejected both.

Suspicious that the Guild might request *ex parte* arbitration, Hearst in writing warned the American Arbitration Association (AAA) that there was no agreement in effect and that any request to appoint an arbitrator would be invalid.

Meetings, however, continued to the end of August 1969 without tangible results. Finally, on October 3, 1969, the Guild by letter requested the appointment of an arbitrator pursuant to AAA rules. In disregard of, and in non-compliance with, its own rules, the AAA on or about October 8, 1969, appointed Thomas T. Roberts as the Arbitrator. The Arbitrator advised the Guild and Hearst that on February 3, 1970, he would hold a hearing which would relate in particular "to the viability of the grievance, the propriety of arbitration, the procedure to be followed if there is to be an arbitration and, of course, my jurisdiction."

The Arbitrator so circumscribed his role as to make the proceeding before him a legal nullity. Thus, in his initial letter to the parties he wrote: "It should be clear that any appearance before me on February 3,

1970, will be in the nature of a 'special appearance.' More specifically, any appearance on that date will not constitute a recognition of my jurisdiction nor will it be deemed a waiver of available defenses relating to a lack of arbitrability."

Hearst, to be doubly sure that its physical presence at any hearing would not be a waiver of its position that the matter was not arbitrable, specifically stated by letter that its participation "should not be considered as a general appearance, special appearance, nor a recognition of your jurisdiction; . . ." Furthermore, Hearst stated that its "involvement in this arbitration should not be construed as a relinquishment of its right and intention to proceed before any appropriate tribunal to vindicate its position that this matter is not arbitrable."

At the hearing itself on February 3, 1970, Hearst reiterated this position and added the ground that the matter was not arbitrable because the Guild had not made a timely request for the appointment of an arbitrator. To this statement the Arbitrator responded "that the Guild [should] understand that if we go forward this morning regarding anything that the company [Hearst] is not making a special appearance, a general appearance or a half-way between appearance." At this and the only hearing, the issue was restricted to the timeliness of the Guild's request for the appointment of an arbitrator. No testimony was presented as to the merits of the employees' claims.

On August 12, 1970, the Arbitrator rendered Findings and Award. He addressed himself to none of the claims or grievances filed by the employees except as he said that the grievances filed under the January 28,

1966 agreement were "not arbitrable because of the failure of the Guild to cause the appointment of an arbitrator in a timely manner as required by Article VII of the said agreement." Thus, he challenged, *sua sponte*, his own appointment by the AAA and, by creating a quasi statute of limitations not in the agreement, decided that the grievances were not arbitrable —in other words, he rejected his jurisdiction to pass upon the asserted grievances.

Frustrated by the California Labor Commission to obtain such benefits to which they may be entitled under the agreement and by the holding of the Arbitrator that their claims were not arbitrable, the beneficiaries under the agreements turned to the courts for relief.

On November 18, 1970, the Guild filed a petition to vacate the so-called Arbitrator's award. The Guild also filed an action against Hearst in the district court for breach of contract, unpaid wages, work and labor performed, money had and received and for certain declaratory relief.

Both actions came on for trial and decision before the Honorable Robert J. Kelleher, *Judge*. Decisions in each action were rendered under date of January 10, 1973. From the decision (Appeal No. 73-1742) vacating the so-called arbitration award and directing that arbitration proceed on the merits, Hearst appeals. From the decision (Appeal No. 73-1838) dismissing the breach of contract, etc., action on the ground that arbitration is the exclusive remedy under the agreement, the Guild appeals. These appeals will be considered on a composite basis because it would seem that together they present all questions of law and fact pertinent to a resolution of the respective rights of the parties.

So many questions of law and fact have been raised that some sifting analysis may well be made at the outset. The primary and initial question to be solved is: is the agreement in effect so as to control the rights of the parties thereto and, if in effect, what are those rights? Hearst claims that it is not and that it ceased to be operative either after its expiry date or because of the Guild's strike on December 15, 1967. The Guild, in turn, claims that the agreement was a wage contract; that the rights of the employees to the payments therein provided for became vested; and that these were not destroyed by the failure to negotiate a new contract or by strike. Subsidiary to this question is whether there is a difference between employees whose rights ripened on or before December 15, 1967, and those whose rights ripened thereafter. But all important is *who* is to determine whether the agreement was in effect so as to create these rights because, if there be no enforceable agreement, no rights substantive or procedural flow therefrom. The choice would appear to be limited to the courts, an arbitrator or possibly both.

The issue is not without its complexities. As the District Court pointed out in its opinion (Arbitration vacatur case) "Hearst did '. . . not intend to relinquish its rights to have this question of arbitrability resolved in any appropriate court tribunal.' " (Arbitration Proceedings' Transcript at 7.) The Court also referred to a pre-trial statement by Hearst's counsel that first, the Court had "to find that the basic underlying dispute is arbitrable. That is the duty of the Court." (Tr. Oct. 21, 1971, at 88). Although this comment may be somewhat ambiguous, i.e., is the agreement in effect and operative and is the dispute arbitrable thereunder, it is clarified by the Court's making a "judicial determina-

tion" and adjudging that "The contract between the parties, so far as it provides for amicable settlement or arbitration of disputes, is in full force and effect." and that "the grievances initiated by the Guild, based on Articles IV and XI of the collective bargaining agreements are properly arbitrable under those agreements;." The Court kept open the opportunity for amicable settlement by ordering that the Guild and Hearst "proceed to adjust their dispute as provided in Article VII of their agreements." However, if such a settlement were not reached as contemplated in sections 1 and 2 of said Article, "the parties shall have the right to proceed to have arbitrated the merits of the disputes as provided in section 3 of Article VII of their agreement."

The Conclusions of Law give direction to the judgment. The Court concluded that "the existence of an agreement to arbitrate a particular dispute is a matter for the Courts to decide"; that Hearst had not relinquished its right to have this issue judicially determined; that the issue of substantive arbitrability not having been determined, the Guild was precluded from unilateral initiation of arbitration; that the Arbitrator's award on procedural issues was of no effect and should be vacated. Of particular importance are the conclusions that the agreements are in full force and effect; that the grievance and arbitration provisions "cover the alternate benefits and dismissal pay disputes" and that Hearst is bound to resolve the grievances in the manner provided by the agreements; and that the parties must proceed to adjust their dispute as provided in Article VII. A judgment to this effect was ordered.

The Court, thus, clearly answered the question: was the agreement in effect. Obviously in its opinion neither

expiry date nor strike had destroyed its contractual obligations. All that remains is to determine the respective rights of the parties thereto.

On appeal (the award vacatur appeal) Hearst argues in substance that the Guild, by appearing before the Arbitrator on February 3, 1970, and litigating the procedural issue of timeliness in seeking arbitration, is bound by the award which is subject to only a limited judicial review which review does not include examining the Arbitrator's determination that the Guild delayed unreasonably in appealing to the AAA and that the Arbitrator could decide *sua sponte* whether he could limit himself solely to the issue of the propriety of his appointment.

Our function on appeal is to pass upon alleged errors in the District Court's opinions. Vacatur of the so-called award is the ultimate issue in No. 73-1742.

The award should be vacated. The parties made their agreement under which the Guild employees worked and Hearst received the benefits of their services. The employees' rights under Articles XI and IV were an important part of their contract. For over two years Hearst rejected all demands for recognition of the employees' claims and for arbitration on the theory that no agreement was in effect. Nevertheless negotiations of sorts were continuing during that period. When finally on October 3, 1970, the Guild was driven to seek unilateral arbitration, the AAA in non-conformity with its own rules appointed Arbitrator Roberts. The record discloses no facts upon which a claim of lack of timeliness can be sustained even if this had been the grievance contemplated by the agreement. All during this period it was Hearst and not the Guild which refused to recognize any duty to arbitrate.

We turn now to the Guild's action for breach of contract, etc. (Appeal No. 73-1838). The District Court dismissed this action "[s]ince arbitration is the exclusive remedy, an action for damages in breach of contract will not lie." The Court relied on the so-called trilogy[2] as enunciating a national policy of settling labor disputes by arbitration. On this appeal Hearst, despite its repeated proclamations that no agreement was in effect, supports the District Court's position that the Guild's sole remedy is through "the Arbitral Process Provided for by the Collective Bargaining Agreement." It claims that the Guild had the right to proceed *ex parte* to arbitration. But even in this endeavor the Guild was frustrated by Hearst's refusal to recognize the agreement and to appear, and by the Arbitrator's acceptance of that refusal. In view of our decision affirming the District Court's vacatur decision No. 73-1742, it is unnecessary to consider what the effect of a decision might have been against a "company [(Hearst) that] is not making a special appearance, a general appearance or a half-way between appearance."

While there is no doubt that arbitration is the favored path to the solution of labor disputes, there still remains to the courts the duty to oversee the arbitral process to ensure that the parties receive the arbitration that they bargained for. Thus, in this case the Court had jurisdiction to determine arbitrability and then to compel arbitration, *IUOE Local 150 v. Flair Builders, Inc.*, 405 U.S. 487 (1972). But this supervisory function is a far cry from that of an arbitrator

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[2]*United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

taking into his own hands the timeliness of his own appointment, a matter quite *dehors* the agreement and parenthetically quite unsupported by the facts.

It might well be that Hearst's repudiation of the agreement would have given the Guild the right to obtain a judicial determination of its rights on the theory of breach of contract. But after seven years, it is time that the merits of the controversy be decided. The question is should decision be by court or by arbitrator? Even if arbitration be not the exclusive remedy, it is the remedy for which the parties contracted and which the District Court has decreed to be the proper road to follow.

Both parties have cited hosts of cases dealing with the labor problems of other companies under other circumstances. Most of them stand for the proposition that arbitration is to be favored for a solution of labor disputes as indeed it should be if the subject matter of the disputes is put fairly before the arbitrator.

However, this court is not called upon to debate the wisdom of other decisions upon other facts. Our task is to decide the relief which should be granted upon the specific facts before us. Accordingly, we affirm the judgments of the District Court in both appeals except with one slight modification. The seven years have produced no signs of amicable settlement. No benefit will come to either party by continuing their deadlock. In colloquial terms, it is time to get on with it. Therefore, the judgment in No. 73-1742 is modified to the extent that the parties shall have the right to proceed

to have the merits of their disputes arbitrated; that either party, or both, may forthwith request the American Arbitration Association to cause the appointment of an arbitrator who shall be appointed in accordance with its rules; that the arbitrator shall hear and determine the rights of the parties under the agreement including the alternate and dismissal pay benefits and any other issues properly before him; and that such appointment, hearings and determination be made as expeditiously as possible.

No. 73-1838

In view of our decision with respect to No. 73-1742 holding that any and all grievances properly cognizable under the Hearst-Guild collective bargaining agreement be decided by an arbitrator, the judgment in No. 73-1838 is affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS *FOR THE NINTH CIRCUIT*

IN THE MATTER OF ARBITRATION BETWEEN LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, *Petitioner-Appellee,* *vs.* THE HEARST CORPORATION, a corporation, Los Angeles Herald-Examiner, a Division of The Hearst Corporation, and Hillbro Newspaper Printing Company, a Division of The Hearst Corporation, *Respondents-Appellants.*	)	No. 73-1742
	)	ORDER
LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, et al., *Plaintiffs-Appellants,* *vs.* THE HEARST CORPORATION, a corporation, *Defendant-Appellee.*	)	No. 73-1838

[Filed November 12, 1974]

Before: MOORE, WRIGHT and GOODWIN, Circuit Judges.

The panel as constituted in the above cases has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The motion of plaintiffs-appellants in No. 73-1838 to stay the issuance of mandate therein is denied.

APPENDIX C.

In the Matter of Arbitration Between LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, Petitioner,

v.

The HEARST CORPORATION, a corporation, et al., Respondents.

Civ. No. 70-2653-RJK.

United States District Court,
C. D. California.
Jan. 10, 1973.

MEMORANDUM OF OPINION AND ORDER.

KELLEHER, District Judge.

Petitioner, by this proceeding, seeks to vacate an arbitration award. Petitioner filed this action in the Superior Court of the State of California For the County of Los Angeles. Respondents removed the proceeding to this Court by invoking the original jurisdiction conferred by Section 301 of the Labor Management Relations Act of 1947, as amended, (29 U.S.C.A. § 185(a)). [29 U.S.C.A. § 185(a)].

After a trial before this Court the matter was ordered submitted.

The facts are as follows:

On January 28, 1966, the Los Angeles Newspaper Guild (Guild) entered into two collective bargaining agreements with the Hearst Corporation. Negotiations for a new collective bargaining agreement began on

October 15, 1967. Failure to agree on a new contract precipitated a strike by the Guild commencing December 15, 1967. Shortly thereafter the Guild, on behalf of individual employees, demanded dismissal pay and alternative pay benefits under Articles IV and XI of the collective bargaining agreements.

Claiming that the collective bargaining agreement had been terminated due to the strike, Hearst refused payment. It is this refusal to pay that the Guild sought to have arbitrated. However, Arbitrator R. R. Roberts ruled that the grievances filed by the Guild were not arbitrable because of the failure of the Guild to cause the appointment of an arbitrator in a timely manner as required by Article VII of the collective bargaining agreements.

The problem presented to the Court is the extent to which the Court may review the arbitrator's decision. On this point Justice Douglas in United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, at 599, 80 S.Ct. 1358, at 1362, 4 L.Ed.2d 1424 (1960) wrote:

> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

In Holly Sugar Corp. v. Distillery, Rectifying, Wine & A. W. I. U., 412 F.2d 899 (9th Cir. 1969), the court stated at 903:

> "Accordingly, while the courts must insure that the arbitrator's award 'draws its essence from the

collective bargaining agreement' and that his decision does not 'manifest an infidelity to this obligation,' 363 U.S. at 597 [80 S.Ct. 1358], they must resist 'the temptation to "reason out" a la judges the arbiter's award to see if it passes muster.' Safeway Stores v. American Bakery & Confectionery Workers International Union [5 Cir.], *supra* [390 F.2d 79] at 83. Therefore, if, on its face, the award represents a plausible interpretation of the contract in the context of the parties' conduct, judicial inquiry ceases and the award must be affirmed."

Since the arbitrator based his decision on a procedural point not reaching the merits of the claimed grievances, the decision in John Wiley & Sons v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed. 2d 898 (1964), is most pertinent. That action was brought under a section of the Labor Management Relations Act (LMRA) to compel arbitration under a collective bargaining agreement. The Court held that the arbitrator, not the court, is to decide whether procedural pre-requisites under the collective bargaining agreement have been performed. This case seems controlling here and the defendants so argue.

However, the resolution of the issues here presented cannot be accomplished without considering the companion case of Los Angeles Newspaper Guild, Local 69, etc., et al. v. Hearst Corp. et al., 352 F.Supp. 1382 (C.D.Cal. (1973)), in which the Guild sought relief for Hearst's alleged breach of the collective bargaining agreements by repudiation. That case holds that arbitration under the collective bargaining agreements is the exclusive remedy. To deny arbitration,

considering that arbitration is the exclusive remedy, would in effect deprive grievants any opportunity to present anywhere for resolution the merits of their claims.

Hearst steadfastly refused to arbitrate on the ground that the events which gave rise to the grievances occurred after termination of the collective bargaining agreements; their contention was that the Guild's strike in December of 1967 caused a termination of the contractual right to arbitration. Once the arbitrator decided that arbitration was barred on procedural grounds, Hearst changed its tune.

The issue of whether the grievances were in fact properly arbitrable under the collective bargaining agreements has never been resolved. The Guild made a grave error in not bringing a court action to compel arbitration; such an action necessarily would have decided that issue. Then there would be no question as to the validity of the arbitrator's award.

Instead, the Guild chose to prosecute their claims before the State Labor Commissioner. After these efforts proved unsuccessful, despite a finding that the claims were valid, the Guild requested appointment of an arbitrator. Had the arbitrator decided in favor of the Guild, Hearst, no doubt would have refused to abide by the award claiming that the grievances were not properly arbitrable since the collective bargaining agreement under which they arose had been terminated by the Guild's strike. At that point the issue of whether the grievances were properly arbitrable probably would have been presented to a federal court.

This, of course, did not happen. And, if the Court decides that the arbitrator's award must stand, then

Hearst will have had the best of both worlds. On the one hand they argued the matter was not arbitrable under the contract on substantive grounds, while on the other they claim the benefit of the arbitrator's decision that the matter was not arbitrable on procedural grounds.

As earlier indicated, the *Wiley* decision provides the key with which to resolve this matter. At 376 U.S. 556, 557, 84 S.Ct. at 918, the court wrote:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. Even under a contrary rule, a court could deny arbitration only if it could confidently be said not only that a claim was strictly 'procedural,' and therefore within the purview of the court, but also that it should operate to bar arbitration altogether, and not merely limit or qualify an arbitral award."

This language suggests that where, as here, the issue is whether a recalcitrant party (Hearst) was bound to arbitrate has not been decided, this Court is not bound by the arbitrator's ruling denying arbitration on procedural grounds. Manifestly, it is for the Court to decide what is or is not properly arbitrable under collective bargaining agreements.

In United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, at 567-568, 80 S.Ct. 1343, at 1346, (1960), the Court stated:

> "The function of the court is very limited when the parties have agreed to submit all questions

> of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."

The Court in *Wiley*, 376 U.S. 543, at 547, 84 S.Ct. 909, at 913, also stated:

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all."

Since Hearst contended that the subject matter of the underlying dispute was not properly arbitrable, until that issue was resolved either judicially or by mutual agreement, the Guild was precluded from unilateral initiation of arbitration pursuant to Article VII § 3(b) of the collective bargaining agreements. As the language of *Wiley* suggests, the duty to arbitrate is created by contractual agreement. Hearst's position was that it had no duty to arbitrate under the collective bargaining agreements with the Guild. If no contractual duty to arbitrate exists, then provisions for unilateral initiation of arbitration are meaningless. Hearst could not have been forced by the unilateral initiation provisions to arbitrate that which it had no contractual duty to arbitrate.

Counsel for the Hearst Corporation, in a hearing before this Court held on October 21, 1971, recognized that:

> "First of all, you (the Court) have to find that the basic underlying dispute is arbitrable. That is the duty of the Court." Reporter's Transcript, October 21, 1971, at 88.

It is clear also from the transcript of the arbitration proceedings held on February 3, 1970, that Hearst did ". . . not intend to relinquish [their] right to have this question of arbitrability resolved in any appropriate court tribunal." Arbitration Proceedings' transcript at 7. It is appropriate that this judicial determination be made. Accordingly, the Court finds that the arbitration award has no effect and must be vacated.

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, at 582-583, 80 S.Ct. 1347, at 1353 (1960).

Utilizing this standard and considering the statement of counsel for the Hearst Corporation made October 21, 1971, (Reporter's Transcript at 88) to the effect that the grievances were arbitrable, this Court holds that the Hearst Corporation is compelled, under the collective bargaining agreements, to resolve the grievances in the manner provided by that agreement.

Upon the foregoing,

It is ordered and adjudged that:

(1) The contract between the parties, so far as it provides for amicable settlement or arbitration of disputes, is in full force and effect.

(2) The arbitrator's award be vacated,

(3) The grievances initiated by the Guild, based upon Articles IV and XI of the collective bargaining agreements are properly arbitrable under those agreements; and

(4) The Los Angeles Newspaper Guild and the Hearst Corporation proceed to adjust their dispute as provided in Article VII of their agreements; provided, however, in the event the parties are unable to reach an amicable settlement as contemplated by sections 1 and 2 of Article VII of their agreement, the parties shall have the right to proceed to have arbitrated the merits of the disputes as provided by section 3 of Article VII of their agreement.

APPENDIX D.

In the Matter of the Arbitration Between Los Angeles Herald-Examiner A Division of The Hearst Corporation And Los Angeles Newspaper Guild Local No. 69	)))))))	ARBITRATOR'S FINDINGS AND AWARD

Grievance: Arbitrability

The instant proceedings were initiated on October 3, 1969, when counsel for the Los Angeles Newspaper Guild, Local No. 69 (hereinafter called the "Guild") addressed a letter to the Los Angeles, California office of the American Arbitration Association. The said letter requested that the American Arbitration Association "appoint an arbitrator" as contemplated by Article VII of a collective bargaining agreement which had been executed on January 28, 1966 by the Guild and the Los Angeles Herald-Examiner, a Division of the Hearst Corporation (hereinafter called the "Company"). The request incorporated the following statements:

> "As you are undoubtedly aware, the strike has been in effect at the Los Angeles Herald-Examiner for some time. . . . A number of the striking employees have resigned their employment and requested the payment of certain alternate benefits which are to be paid under the collective bargaining agreement upon termination, resignation or dismissal. Requests have been made for the payment of similar benefits to the beneficiaries of certain deceased employees.

> The employer has refused and continues to refuse to agree to the selectio[illegible] arbitrator . . . Article VII of the coll[illegible]e bargaining agreement . . . provides for the appointment of an arbitrator by the American Arbitration Association at the request of the complaining party (in this case the union) when the adverse party (in this case the employer) refuses to proceed to the selection of an arbitrator (See Article VII, Section 3 B). Accordingly, we hereby request . . . that the American Arbitration Association appoint an arbitrator pursuant to its rules."

On October 8, 1969, the Guild and the Company were notified in writing that the American Arbitration Association had "appointed Mr. Thomas T. Roberts, Esq., as arbitrator in this matter". Thereafter, a hearing was noticed for February 3, 1970. On January 12, 1970, counsel for the Company advised the participants of his intention to be in attendance at the hearing but with the following reservation: "Any participation on our part at those hearings should not be considered as a general appearance, special appearance, nor recognition of your jurisdiction".

At the commencement of the proceedings convened on February 3, 1970, it was agreed that evidence and argument would initially be restricted to those matters relevant to the contention of the Company that the dispute "is not arbitrable because even if one assumes an obligation [on the part of Management] to arbitrate, the Guild has not satisfied or complied with the requirement of a timely appeal to arbitration".

APPEARANCES

Throughout the course of the hearing of February 3, 1970, both parties were afforded full opportunity to present testimony, introduce evidence and argue the merits of their respective positions. Thereafter, a verbatim transcript of the proceedings was prepared. Finally, opening briefs and reply briefs were submitted. The Union was represented by Mr. Lester G. Ostrov of Bodle, Fogel, Julber and Reinhardt, Attorneys at Law. The Company was represented by Mr. Charles G Bakaly, Jr., of O'Melveny and Myers, Attorneys at Law.

STATEMENT OF FACTS

The collective bargaining agreement identified above provided that it would remain in effect until November 18, 1967. In anticipation of that termination date negotiations were commenced in the fall of 1967. Thereafter, the Company and the Guild continued to meet in an effort to reach agreement upon the terms of a successor contract. Their efforts proved fruitless and on December 15, 1967, the Guild went on strike. The Los Angeles Herald-Examiner continues to be published, however, while the membership of the Guild (including those who have asserted the claims considered herein) remains on strike.

In January of 1968, August Keller, Jr., an employee of the Company and member of the Guild who had honored the picket line, filed a complaint with the Division of Labor Law Enforcement of the California Department of Industrial Relations. The action initiated by Mr. Keller sought recovery of "alternate benefits" as set forth in Article XI of the labor agreement. During the ensuing weeks similar claims for alternate bene-

fits were submitted directly to the Company by other members of the Guild. This circumstance caused Management to send the following letter to the Guild on March 12, 1968:

> "Within the past few weeks we have received inquiries from a number of employees, represented by your union, requesting alternate benefits as provided under Article XI of the most recently expired collective bargaining agreement between us. Aside from the fact that we do not believe that these employees really desire to terminate their employment relationship, but rather are actively engaged in a strike and labor dispute with the Los Angeles Herald-Examiner, we do not believe that either the agreement between your union and us or the provisions of Article XI are applicable or in effect.
>
> We are presently contemplating rejecting the requests of these individual employees on the basis of our beliefs as set forth above. If you desire to discuss this, please advise us."

The claim of Mr. Keller was heard by Deputy Labor Commissioner Otto L. Emerson on March 22, 1968. On March 25th, Mr. Emerson wrote the Company as follows:

> "After listening to testimony given and checking the union contract as well as other documents presented at the hearing held in this office on March 22, 1968, it is the opinion of the undersigned Deputy that claimant August Keller, Jr., has the amount claimed due him.
>
> Please sent a Certified or Cashier's Check in the amount of $10,789.20 to this office immediately."

The Company declined to forward the requested draft and to this date continues to reject the claim of Mr. Keller along with all similar claims.

On March 27, 1968, the Guild responded to the letter of position authored by the Company in the following manner:

> "In reply to your letter of March 12, 1968, please be advised that it is our position that the individuals who have advised you that they desire to receive the alternate benefits referred to in Article II of the Collective Bargaining Agreement dated November 18, 1965 to November 18, 1967, are entitled to receive such benefits.
>
> Unless you afford the requested benefits to the individuals, we will be compelled to take appropriate action to enforce their rights. We would, however, be willing to discuss this matter with you before taking such action, if you so desire."

The meeting contemplated by the above exchange of correspondence took place on April 18, 1968, but without a resolution of the controversy. Even as the discussions progressed, however, additional claims for alternate benefits were received by both the Company and the Division of Labor Law Enforcement. During this same period of time a different and distinct group of claims was likewise lodged with the Company by representatives of deceased members of the Guild who had been employed by the Los Angeles Herald-Examiner when the strike began. The latter type of claim sought the payment of "dismissal pay" under the authority of Article IV, Section 4 of the labor agreement.

On June 7, 1968, the Company put the Guild on notice of its position regarding the requests for dismissal pay by forwarding a letter which in part stated:

> "We have recently received a request from a widow of a former employee, who is represented by your union, requesting payment of her deceased husband's dismissal pay, pursuant to the provisions of Article IV, Section 4, of the most recently expired collective bargaining agreement between the Los Angeles Newspaper Guild and the Los Angeles Herald-Examiner.
>
> It is our belief that said agreement is no longer in effect; consequently, the provisions of Article IV, Section 4 are likewise not applicable or in effect.
>
> We are presently contemplating rejecting this request on the basis of the beliefs as set forth above. We will, however, be pleased to meet with you and discuss this matter prior to taking any further action, . . ."

The meeting suggested in the foregoing correspondence was convened on June 14, 1968, but the parties thereafter adjourned without reaching a mutually satisfactory resolution of the disputes involving alternate benefits and dismissal pay. In response to that impasse, the Guild dispatched the following letter to the Company on June 19, 1968:

> "Pursuant to Article VII, Section 3, of the collective bargaining agreement made and entered into on January 28, 1966, between Los Angeles Herald-Examiner Division of The Hearst Corporation and Los Angeles Newspaper Guild, the Los Angeles Newspaper Guild hereby demands arbitration

of the grievances raised in our letter of March 27, 1968, to wit, your refusal to pay alternate benefits, pursuant to Article XI of the collective bargaining agreement, to certain employees who have terminated their employment and have applied for said benefits.

As we stated in discussions with you on April 18, 1968, concerning this dispute, and in our letter of March 27, 1968, all of the employees involved are eligible for said alternate benefits, and it is our position that they are entitled to said benefits.

We will be happy to meet with you at your convenience to select an arbitrator pursuant to Article VII, Section 3A. Please advise us of a suitable time and place for such a meeting."

The request of the Guild for agreement to submit the alternate benefits dispute to arbitration was denied by the Company on July 1, 1968 when it wrote Local No. 69 as follows:

"Receipt is hereby acknowledged of your letter of June 19, 1968 wherein the Guild demands arbitration of an alleged grievance relative to alternate benefits.

The Company must respectfully reject your demand for arbitration of this matter on the grounds that it arises out of events subsequent to the expiration of the Guild's collective bargaining agreement with the Los Angeles Herald-Examiner."

The Guild next wrote the Company regarding alternate benefits on August 5, 1968 when it forwarded the following letter:

"Los Angeles Newspaper Guild, Local 69, has been informed that Robert M. Oates, an employee

of the Herald-Examiner and a member of this Union, terminated his employment with the Herald-Examiner on June 12, 1968 and requested payment of the alternate benefits due him under Article XI of the collective bargaining agreement entered into on January 28, 1966, effective November 18, 1965, between the Herald-Examiner and this Union. We have also been informed that you refused the payment of said alternate benefits to Mr. Oates.

Pursuant to Article VII, Section 2 of said collective bargaining agreement, we hereby submit a grievance on behalf of Mr. Oates over your refusal to pay alternate benefits to him. As we have stated previously in discussions with you and in letters to you, it is our position that the employees who have terminated their employment and applied for said alternate benefits are entitled to said benefits and we request, therefore, that you pay the benefits to each of the employees involved, including Mr. Oates.

Since we have already considered this dispute previously with respect to other employees, and since it is our understanding that you do not intend to pay said benefits, we would also at this time request that Mr. Oates' grievance be submitted to arbitration.

There undoubtedly are other employees of the Herald-Examiner who have terminated their employment and requested alternate benefits since our previous discussions concerning this dispute, and there undoubtedly will be others who will do so in the future. Inasmuch as you have refused to make the payments involved and since you have

rejected our previous demand for arbitration of this dispute, it would be futile for us to continue filing grievances and demanding arbitration for each individual employee who requests alternate benefits and is refused in the future. We, therefore, will not in the future file individual grievances and request arbitration of each individual dispute. It is our position, however, that each individual similarly situated to those individuals whom we have previously discussed in regard to this matter, is entitled to be paid alternate benefits. We hereby submit to you a grievance on behalf of all individuals whom we have not previously discussed who may have been denied alternate benefits since December 15, 1967 and on behalf of all individuals who are denied said benefits in the future, subject to notice to the contrary from us. We further demand that this grievance on behalf of all of said individuals be submitted to grievance (sic)."

The response of the Company was immediate. On August 6th it sent the following reply:

"Receipt is hereby acknowledged of your letter of August 5, 1968, wherein the Guild demands arbitration of all alleged present and future grievances relative to Alternate Benefits.

As we previously advised you on July 1, 1968, the Company must respectfully reject your demand for arbitration on this matter on the grounds that the issue arises out of events subsequent to the expiration of the Guild's collective bargaining agreement with the Los Angeles Herald-Examiner."

There followed a written request from the Guild for the payment of dismissal pay to the widow of a deceased member "as provided by Article IV, Section 4 of the agreement". This request was denied by the Company on the following day. The denial took the form of a letter which reads in its entirety as follows:

> "Receipt is acknowledged of your letter of August 13, 1968, wherein you request payment, on behalf of Mrs. Donald Shubb, of alternate benefits (dismissal pay) by virtue of Mrs. Shubb's husband, Donald, having passed away on July 25, 1968.
>
> On June 7, 1968, we wrote to Mr. Rupert relative to a similar claim on behalf of Mrs. Patricia D. Skidmore. On that occasion, we advised Mr. Rupert that it was our belief that the provisions of Article IV, Section 4 of the recently expired collective bargaining agreement between the parties was not applicable or in effect, but we offered to meet with Mr. Rupert for the purpose of discussing this matter. On June 14, 1968, Mr. Sjostrom and I met with Mr. Rupert, and during the course of this meeting, both parties fully explored all aspects of this claim.
>
> At the conclusion of this meeting, it was fully understood by both parties that it was the Company's position that Article IV, Section 4 of the recently expired agreement was not applicable or in effect. Conversely, it was understood by both parties that it was the Guild's position that said article and section were in effect.
>
> Since June 14, 1968, the Company has not received any additional evidence to occasion a

change in the Company's position on this matter as explained to Mr. Rupert. Consequently, the Company must again advise you that it is our position that Article IV, Section 4 of the recently expired collective bargaining agreement between the Los Angeles Newspaper Guild and the Los Angeles Herald-Examiner is no longer in effect; similarly, provisions of Article IV, Section 4 are likewise not applicable or in effect.

In view of the foregoing, we must respectfully deny your request for alternate benefits (dismissal pay) to Mrs. Donald Shubb."

It will be recalled that certain members of the Guild had filed claims for alternate benefits with the Division of Labor Law Enforcement. Deputy Labor Commissioner Emerson heard these claims on September 30 and December 11, 1968. On December 12, 1968, he sent the following notice to the Company:

"After studying all the evidence presented and listening to testimony given at the two hearings held in this office on September 30, 1968 and December 11, 1968 and discussing same with our legal staff, it is the opinion of the undersigned that you owe the following verified claims for severance pay:

James K. Blake	$ 8838.00
Frank L. Donoghue	3646.00
William L. Finley	8303.50
William M. Greene	3744.00
Oscar Gabe Holt	2898.00
August Keller, Jr.	9990.00
Louis Ketchel	5155.50
Robert M. Oates	11,244.80

Bryon D. Osborne	8838.00
Robert A. Perez	7365.00
Edward W. Prendergast	8203.50
Jack A. Rarick	7363.00
Fred J. Simon	8838.00
Clifford C. Smith	8838.00
Frederick C. Traylor	7878.00
Edwin T. Vaughn	8838.00
Proctor H. Weir	13,653.00
Warden G. Wentz	12,513.00
TOTAL	$146,047.30

Please send Cashier's Check or Certified Check for this amount to this office within ten days."

The Company declined to honor the claims incorporated in the demand of Deputy Commissioner Emerson and there followed a series of consultations between the Guild and his office. Local No. 69 was initially advised that a criminal complaint would be sought but this technique proved unavailable when the Los Angeles City Attorney refused prosecution in April of 1969. During the following month, Mr. Emerson explored the alternate possibility of initiating a civil court action against the Company. Once again, however, he failed to secure the support of the appropriate legal office and he thereupon remitted the entire matter to the individual claimants. Formal notice of the said action was mailed to the Guild on May 12, 1969. In relevant part, the notice incorporates the following statements of Mr. Emerson:

> "This Division attempted to file a violation of Section 216 of the Labor Code in behalf of your members. The City Attorney's office rejected this complaint.

> After a discussion with our Legal Staff, they informed me that they could not file a civil suit on behalf of your members.
>
> We therefore had no alternative, and have reassigned these claims back to your members. Claimants have been advised to contact their union immediately."

In May of 1969, the Guild wrote all of its members who had gone out on strike but had subsequently "resigned and applied for alternate benefits". It advised each of them that Local No. 69 "has retained an attorney in an attempt to collect the benefits for you" and requested "copies of all pertinent documents . . . to help speed the case to court".

On August 13, 1969, the Guild wrote to the Company as follows:

> "Since the commencement of the labor dispute between Los Angeles Newspaper Guild, Local 69, the Union and the Los Angeles Herald-Examiner, the following employees of the Herald-Examiner have resigned their employment and requested the payment of alternate benefits pursuant to Article XI of the collective bargaining agreement entered into on January 28, 1966, effective November 18, 1965, between the Herald-Examiner and the Guild:
>
> [The letter set forth the names of thirty-four members of the Guild for whom Local No. 69 sought alternate benefits].
>
> It is the Union's understanding that the Company has refused to pay alternate benefits, pursuant to Article XI of the aforementioned collective bargaining agreement, to all of the above named individuals.
>
> . . .

As you are aware, the Union's position in this matter has not changed since our earlier meeting with you and since our previous correspondence. Nevertheless, in view of the additional resignations and new refusals by the company to pay alternate benefits, the union hereby reiterates its position that all employees who have terminated their employment and applied for alternate benefits are entitled to said alternate benefits.

. . .

On behalf of all of the above named employees the union further demands that this matter immediately be referred to arbitration. . . .

Please be further advised that the following former employees of the Herald-Examiner have died since the commencement of the strike: [There followed the names of eleven deceased Guild members]. . . . Since it is the union's understanding that the Company has refused to pay the beneficiaries of these employees in accordance with Article IV, and since we have previously corresponded with you regarding the Company's refusal to pay dismissal pay to the beneficiaries of certain of the above named employees, the union hereby demands that this matter also be submitted to arbitration. . . . We are prepared to meet with you at any mutually convenient time and place for the purpose of selecting an impartial arbitrator. If we do not hear from you by August 20, 1969, we will assume that you have refused to proceed to the selection of an arbitrator, and we shall request the American Arbitration Association to appoint an arbitrator in accordance with Article VII of the aforesaid collective bargaining agreement."

Once again, the response of the Company was almost instantaneous. On August 15, 1969, the following letter was mailed to the Guild:

> "Receipt is hereby acknowledged of your letter of August 13, 1969, relative to the Los Angeles Herald-Examiner's refusal to make payments for certain claims pursuant to the provisions of Articles IV and XI of the most recently expired bargaining agreement between the Los Angeles Newspaper Guild and the Herald-Examiner.
>
> As you know, the Herald-Examiner has consistently refused to honor requests for such payments on various grounds, including the ground that neither the agreement between your Union and the Herald-Examiner, nor the provisions of Article IV or Article XI are applicable or in effect. In addition to the foregoing, the Herald-Examiner also has other defenses to such claims and requests.
>
> Inasmuch as it is our position that the collective bargaining agreement between your Union and the Herald-Examiner terminated on December 15, 1967, we must decline your request to meet for the purposes of selecting an Arbitrator or proceeding to arbitration.
>
> However, we are willing to meet with you concerning the subject matter of the claims referred to in your letter, at a time and place mutually convenient, but it should be clearly understood that we will not meet with you for the purpose of selecting an impartial Arbitrator or otherwise proceeding to arbitration."

There followed the Guild letter to the American Arbitration Association dated October 3, 1969 in which the appointment of an arbitrator was requested under the authority of Article VII of the agreement. Finally, a hearing was convened on February 3, 1970.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE IV
DISMISSAL PAY

Section 4—In the event of the death of any employee with six (6) or more months of service the Publisher agrees that the beneficiaries of the deceased, designated by the employee in writing in advance, shall be paid a sum equivalent to that which the deceased would have been paid had he been discharged under the terms of this contract, but in no event less than five hundred dollars ($500.00), less any legal costs or expense caused the Publisher in making said payments.

ARTICLE VII
ADJUSTMENT OF DISPUTES

Section 2—A grievance shall be submitted only by a written notice from the complaining party to the other party within sixty (60) days of the event giving rise to the grievance. Said notice shall set forth the facts giving rise to the grievance, the ground of complaint and the action or remedy requested.

Section 3—A grievance raised under Section 2 above, must be resolved, dismissed or submitted to arbitration within sixty (60) days following receipt of the written notice provided for in Section 2 above. By mutual agreement, any properly sub-

mitted grievance may be moved to arbitration at any time within said sixty (60) day period.

A party desiring arbitration shall serve written demand, therefore, upon the opposing party within sixty (60) days of the written notice provided for in Section 2 above, whereupon the following procedure shall apply:

A. Within five (5) days of the written notice of arbitration hereinbefore prescribed, the parties shall meet to select an arbitrator to whom the grievance of the complaining party shall be submitted for final decision.

B. If such an arbitrator is not selected, or the party adverse to the complaining party refuses for any reason to proceed to the selection of an arbitrator, or if for any other reason an arbitrator is not selected or secured, within the aforesaid five (5) day period, then the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator pursuant to the present rules of the voluntary labor arbitration tribunal of the American Arbitration Association, and the grievance shall be submitted to such arbitrator for final decision.

C. The arbitrator shall follow rules of procedure agreed to by the parties, but in the absence of agreement thereon, the rules of the voluntary labor arbitration tribunal of the AAA shall govern.

Section 4—It is specifically agreed and understood that the time limits specified in this Article shall be observed unless amended, or extended, by

mutual written agreement of the parties. For the purpose of calculating time under this Article, it is agreed and understood that Saturdays, Sundays and Holidays, as recognized by this Agreement, shall not be considered.

ARTICLE XI
ALTERNATE BENEFITS

Section 1. Upon reaching the age of sixty-five (65), or upon completion of twenty-five (25) years of continuous and uninterrupted service, as hereinbefore defined in Article IV, or upon certification of a doctor designated by the Publisher that the employee is permanently incapacitated from discharging his duties, such employee may terminate his employment and upon written application to the Publisher shall receive a cash lump sum based on years of continuous and uninterrupted service as hereinbefore defined in Article IV as follows:

Less than 5 years of service	5 weeks
5 to 10 years of service	15 weeks
10 to 12½ years of service	20 weeks
12½ to 15 years of service	25 weeks
15 to 17½ years of service	30 weeks
17½ to 20 years of service	35 weeks
20 to 22½ years of service	40 weeks
22½ to 25 years of service	45 weeks
25 to 27½ years of service	50 weeks
27½ to 29½ years of service	56 weeks
29½ years of service and over	60 weeks

Section 2. Payments under this Article shall be in lieu of any other terminal pay under the dismissal pay provisions of Article IV.

POSITION OF THE GUILD

It is the contention of Local No. 69 that the Guild has complied with all of the procedural requirements expressed in Article VII of the collective bargaining agreement. It argues the grievances seeking alternate benefits and dismissal pay are therefore arbitrable and subject to disposition on their merits. The Guild states it submitted a demand for arbitration within sixty working days of the "written notice" contemplated by Section 2 of Article VII and thereby complied with the initial requirement of Section 3. It asserts that when thereafter faced with the refusal of the Company "to meet to select an arbitrator" Local No. 69 was relieved of any obligation to immediately request such an appointment through the American Arbitration Association.

The Guild notes that Article VII of the agreement carefully assigns time periods for the filing of grievances and their referral to arbitration, but is singularly silent as to any time limitation within which "to proceed to the appointment of an arbitrator". It is said that the absence of a specific time increment for the assertion of such a request conclusively demonstrates the intent of the parties to create "an unlimited right which may be exercised at any time".

Local No. 69 further contends that even if Section 3 of Article VII were interpreted as requiring referral to the American Arbitration Association within a reasonable period of time following the refusal of the Company to participate in the selection of an arbitrator, under the circumstances present in the instant case the Guild acted with due dispatch. It cites as justifiable delay the decision of its officers to first proceed with

the prosecution of the complaints before the Division of Labor Law Enforcement in the hope that to do so "would prevent the necessity of going to arbitration, thereby saving time and expense". The Guild also argues that "much of the delay in reaching arbitration arises as a direct result of the Company's total repudiation of the agreement and total repudiation of its obligation to arbitrate". In addition thereto, it suggests "a major factor in the instant case which cannot be ignored is the fact that a strike by the Union against the Company has been in progress since December 15, 1967".

The Guild concludes by suggesting the Company is attempting to bar a hearing on the merits of the disputes at hand by raising the equitable defense of laches. It insists laches may not be found in the absence of prejudice to the party seeking to assert that doctrine and "no prejudice to the company has occurred as a result of any delay"

In conclusion, the Guild states the following contention: "The Company has repudiated arbitration and the contract, has refused to abide by the arbitration provisions of the contract, has refused to proceed to arbitration or to select an arbitrator, and is therefore estopped from claiming that the Union has failed to abide by the procedural requirements of the contract".

POSITION OF THE COMPANY

The Company responds by arguing that the collective bargaining agreement expired before the accrual of the claims submitted herein, before any of the present grievants had submitted such claims to Management, and before the Guild made its first request for arbitration. It adds that even if there had existed an obli-

gation to arbitrate, "these grievances are still not arbitrable because the Guild did not timely seek the appointment of an arbitrator". Management contends the "right" to request such an appointment by the American Arbitration Association must be exercised within a reasonable period of time following the notice of appeal to arbitration under Section 3 of Article VII. It notes the Guild was free to at any time request the designation of an arbitrator but failed to act prior to October 3, 1969.

The Company asserts the responsibility of a complaining party to proceed to arbitration within a reasonable period of time has been recognized by both arbitrators and the courts, particularly where the other side has been guilty of neither delay nor misrepresentation. It argues that the delay of the Guild in the present case was excessive because the referral to the American Arbitration Association did not occur until 389 working days after the March 27, 1968 presentation of the written notice of demand for payment of alternate benefits. As to the dismissal pay claims, the Company states 256 working days elapsed between the notice of grievance dated August 13, 1968 and the demand for arbitration submitted on August 13, 1969.

In conclusion, the Company contends the Guild may not seek to justify its delay by directing attention to the proceedings prosecuted before the Division of Labor Law Enforcement because in so acting it knowingly assumed the risk that to do so might compromise any subsequent effort to obtain arbitration.

DISCUSSION

It is appropriate at the outset to again state the limited scope of the present inquiry. This may be accomplished by first reciting what is not at issue. In doing so it is to be observed that the question is not whether the severance benefits identified in Article IV and Article XI of the collective bargaining agreement represent "rights" which have vested and thus survive the turmoil attendant upon the economic action initiated by Local No. 69 on December 15, 1967. Nor is the finality of the announced intent of the Guild members to actually resign in order to gain alternate benefits a factor to be presently considered. What is now subject to adjudication is the narrow issue of whether or not the Guild sought the appointment of an arbitrator in a timely manner. Indeed, for this purpose it may be assumed that the obligation of Management to submit to arbitration continued beyond the termination of the collective bargaining agreement.

It is unquestionably true that the stakes in this arbitration are high. The number of Guild members claiming severance benefits thus far is in excess of forty-five and the total of the yet unidentified grievants will presumably be substantially in excess of that figure. Each of them lays claim to "a cash lump sum" in varying but substantial amounts which in the aggregate exceed $150,000.00. The Guild further notes that the benefits sought are computed on the basis of continuous and satisfactory service to the Company, frequently over a period of considerable duration. It argues that under

such circumstances a finding of non-arbitrability because of a failure to comply with the technical provisions of the collective bargaining agreement relating to the processing of grievances would result in manifest injustice.

I am in agreement with the principle that wherever possible disputes should be resolved on their merits and not turn on procedural niceties which serve to preclude independent inquiry. Furthermore, an indiscriminate endorsement of defenses founded upon concepts relating to estoppel or laches should be avoided. This is not to say, however, that the expressed intent of the parties when adopting a precise and structured procedure governing the adjustment of disputes may be brushed aside in the name of equity. If the parties to a collective bargaining agreement deny their arbitrator any "authority to change, amend, modify or terminate" the provisions of that document (as did the Company and the Guild in Article VII, Section 3) it would constitute an abuse of arbitral office were he to disregard the mandate solely because of a desire to judge the substantive worth of a grievance claim. Further, Section 4 demands that "the time limits specified in this Article shall be observed unless amended, or extended, by mutual written agreement of the parties". No such understanding or extension has been revealed by the evidence.

The Guild urges a finding that the Company is now estopped from invoking the time limits found in Article VII because "it has totally disregarded and destroyed the arbitration provisions of the contract, and completely thwarted every effort of the Union to bring this matter to arbitration through the normal channels and under the procedure normally utilized by the parties". The difficulty with this contention lies in the fact

that the Guild and its members possess no right to arbitrate grievances except as that procedure is established in the labor agreement. If the contractual authority which permits appeals to arbitration is to be honored, it must be applied in its entirety or not at all. The time limits which appear in Article VII represent the dominant theme of that provision. The Guild cannot now be heard to disclaim what is embarrassing while concurrently invoking only that which offers hope of victory.

It follows from what has been said above that the Company need not rely on the doctrine of laches. To the contrary, it is the burden of the Guild to show compliance with the "statute of limitations" adopted in Article VII. This is not a case of negligent delay on the part of one party coupled with an absence of defined time limits so as to bring injury to the other party. To the contrary, Sections 2 and 3 of Article VII call out specific time increments applicable to each stage of grievance processing. Only the right of the complaining party to unilaterally call for the appointment of an arbitrator is free from a specific time limitation. As to the latter procedure, however, it is significant to note that the right of referral to the American Arbitration Association constitutes an integral part of a carefully defined system which contemplates a timely movement of grievances to arbitration. A complaining party is afforded sixty days from the protested event in which to file "written notice" of a grievance. An additional sixty days is permitted for the submission of an appeal to arbitration. At that point, however, the time increments accelerate. Only five days are available for the effect to mutually select an arbitrator. In the absence of such mutuality, the complaining party must then turn to the

American Arbitration Association for the appointment of an arbitrator. Surely the parties intended that this last act would be accomplished within a reasonable period of time rather than forever remaining "an unlimited right which may be exercised at any time" as suggested by the Guild.

Nor may the Guild successfully assert ignorance of the procedural disability inherent in a failure to adhere to the strictures imposed upon the processing of grievances. By its own admission the presentation of the June 19, 1968 request for arbitration of the alternate benefit grievances was carefully timed to fall on the 59th working day following the Section 2 written notice given on March 27, 1968. Thus a full six months after the commencement of the strike the Guild recognized an obligation of fidelity to the terms of Article VII if claims were to be arbitrated. Only when it thereafter elected to concentrate on the proceedings before the Division of Labor Law Enforcement did it announce a belief that those time limits were no longer binding.

The earlier sensitivity of the Guild to the procedural precepts expressed in Article VII is perhaps more understandable when it is noted that the practice of the parties during the life of the collective bargaining agreement saw the selection of an arbitrator occur within sixty calendar days (rather than working days) of the demand for arbitration. This was true in each of the six grievances appealed to arbitration by the Guild. If during the life of the agreement the parties demonstrated their intent by adhering to such a schedule, I cannot understand how it may now be said that a different rule should apply simply because of the availability of an alternate tribunal, i.e., the Labor Commissioner.

What were the operative events which in the case at hand triggered the commencement of the time periods set forth in Sections 2 and 3 of Article VII? The first written demand for the payment of alternate benefits appears in the Guild letter of March 27, 1968. This followed the March 12, 1968 advice of Management that the Company was "presently contemplating rejecting the requests" for such payments. The Guild therefore initiated the first alternate benefits grievance "within sixty (60) days of the event giving rise to the grievance" as required by Section 2. Furthermore, as noted above the subsequent written demand for arbitration dated June 19, 1968 was filed on the 59th working day following the presentation of the grievance and therefore met the initial requirement of Section 3. The Company then unequivocally denied the grievance on July 1, 1968. Rather than thereupon securing the appointment of an arbitrator through the assistance of the American Arbitration Association, the Guild chose to file what might be termed a class grievance protesting the failure to award alternate benefits to "each individual similarly situated to those individuals whom we have previously discussed" and again demanded arbitration.

The response to the second request for arbitration was immediate. On the following day the Company again rejected the overture in writing. It was at this point in time that the Guild assumed an obligation under the contract it sought to enforce, an obligation to act with reasonable dispatch and "request the American Arbitration Association to proceed to the appointment of an arbirtator". Rather than doing so, however, Local No. 69 determined "it would be to our advantage to proceed with the Labor Commissioner" be-

cause it entertained a "hope that the criminal action by the Labor Commissioner might resolve the matter more quickly". A calculated judgment was thus reached and it must be presumed that all possible risks attendant thereto were considered. In any event, it was not until more than one year later that mention was next made of a desire on the part of the Guild to arbitrate the alternate benefits claim. In my judgment, the letter of August 13, 1969 came too late. The demand set forth therein "that this matter immediately be referred to arbitration" was presented 353 working days after the original grievance letter of March 27, 1968 and 256 working days subsequent to the second grievance filed on August 13, 1968. Beyond all of that, it was dated three months after the Guild had formally been notified by Deputy Labor Commissioner Emerson he had been denied access to the courts. Finally, the Guild delayed still further in requesting the American Arbitration Association to appoint an arbitrator, an action not initiated until October 3, 1969, i.e., some 100 working days following the disclaimer notice from Mr. Emerson.

The delay in the prosecution of the dismissal pay grievances is even more aggravated. That claim was first reduced to writing by the Guild on August 13, 1968 when it submitted a request for payment on behalf of the survivor of a deceased former employee. Once again, the Company unequivocally denied the claim on the very next day. Thereafter, the matter was abandoned until the posting of the letter of August 13,

1969. Thus what was once a timely grievance protesting an earlier statement of the Company dated June 7, 1968 became a casualty of forum shopping and ignored until one day short of the passage of an entire year.

The Guild correctly notes that the relationship of the parties during this period of time was something other than "normal". More specifically, a strike was in progress and the Company continued to meet with the representatives of its employees solely under the compulsion of Section 8(a)(5) of the National Labor Relations Act. Furthermore, two hearings were conducted by Deputy Labor Commissioner Emerson during the interim period and the attention of the Guild was directed to the perfection of those claims. Nevertheless, nothing in the record lends the slightest support to the charge of the Guild that the Company was somehow guilty of "thwarting" its desire to arbitrate, or that Management otherwise contributed to the delay. Indeed, Article VII was negotiated in anticipation of precisely the circumstance faced by the Guild, i.e., a refusal by one of the parties to take part in the selection of an arbitrator. The sum total of the effort demanded of the Guild when confronted with the flat rejection of the viability of its grievances by the Company was no more than to address a letter to the American Arbitration Association as was ultimately done on October 3, 1969. I can find no satisfactory explanation for its failure to do so earlier nor an unreasonable burden in such a procedure. In my judgment the grievances protesting the failure of the Company

to honor the claims for alternate benefits and dismissal pay were not appealed to arbitration in a timely manner and they are therefore not now arbitrable.

AWARD

The grievances filed by the Los Angeles Newspaper Guild which call upon the Los Angeles Herald-Examiner to recognize claims for dismissal pay under Article IV and for alternate benefits under Article XI of the collective bargaining agreement executed on January 28, 1966 are not arbitrable because of the failure of the Guild to cause the appointment of an arbitrator in a timely manner as required by Article VII of the said agreement.

DATED: August 12, 1970.
Rolling Hills, California.

/s/ Thomas T. Roberts
Thomas T. Roberts, Arbitrator

State of California, County of Los Angeles—ss.

On August 12, 1970, before me personally appeared THOMAS T. ROBERTS, known to me to be the person whose name is subscribed to the within instrument and he acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

/s/ Nadine M. Richardson

APPENDIX E.

ARBITRATION CLAUSE FROM THE APPLICABLE COLLECTIVE BARGAINING AGREEMENT.

Article VII—Adjustment of Disputes.

SECTION 1—A Grievance Committee, designated by the Guild, shall be established to settle amicably with a committee appointed by the Employer, all grievances arising under this Agreement.

SECTION 2—A grievance shall be submitted only by a written notice from the complaining party to the other party within sixty (60) days of the event giving rise to the grievance. Said notice shall set forth the facts giving rise to the grievance, the ground of complaint, and the action or remedy requested.

SECTION 3—A grievance raised under Section 2, above, must be resolved, dismissed or submitted to arbitration within sixty (60) days following receipt of the written notice provided for in Section 2 above. By mutual agreement, any properly submitted grievance may be moved to arbitration at any time within said sixty (60) day period.

A party desiring arbitration shall serve written demand therefore upon the opposing party within sixty (60) days of the written notice provided for in Section 2 above, whereupon the following procedure shall apply:

A. Within five (5) days of the written notice of arbitration hereinbefore prescribed, the parties shall meet to select an arbitrator to whom the grievance of the complaining party shall be submitted for final decision.

B. If such an arbitrator is not selected, or the party adverse to the complaining party refuses for any reason to proceed to the selection of an arbitrator, of if for any other reason an arbitrator is not selected or secured, within the aforesaid five (5) day period, then the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator pursuant to the present rules of the voluntary labor arbitration tribunal of the American Arbitration Association, and the grievance shall be submitted to such arbitrator for final decision.

C. The arbitrator shall follow rules of procedure agreed to by the parties, but in the absence of agreement thereon, the rules of the voluntary labor arbitration tribunal of the AAA shall govern.

D. Expenses of arbitration which are jointly incurred shall be shared equally by the parties, except that neither party shall be required to pay any part of the cost of a stenographic record without its consent, provided that failure of a party to agree to share the cost of such stenographic record shall be deemed a waiver of such party's right of access to the record.

E. The award of the arbitrator shall be final and binding.

F. It is agreed that the arbitrator shall have no authority to change, amend, modify or terminate any provision(s) of this Agreement.

SECTION 4—It is specifically agreed and understood that the time limits specified in this Article shall be observed unless amended, or extended, by mutual written agreement of the parties. For the purpose of calculating time under this Article, it is agreed and understood that Saturdays, Sundays, and Holidays, as recognized by this Agreement, shall not be considered.

APPENDIX F.

Opinion of the United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AUGUST PAUL ROSSI, *Plaintiff-Appellant,*	)	
vs.	)	No. 73-1458
TRANS WORLD AIRLINES, INC., *Defendant-Appellee.*	)	OPINION

[November 27, 1974]

Appeal from the United States District Court
For the Central District of California

Before: TRASK, CHOY and GOODWIN, Circuit Judges.

PER CURIAM:

Rossi, a flight engineer employed by TWA, enrolled in the company's First Officer Training Program. Because his progress in the program was unsatisfactory, he was dismissed from the program and discharged as flight engineer. The Pilots' System Board of Adjustment, an arbitration board established by the collective bargaining agreement pursuant to the mandate of the Railroad Labor Act as applied to air carriers, 45 U.S.C. § 184, sustained his dismissal.

Rossi sought reinstatement in district court, claiming that failure to complete the training program bore no rational relationship to his ability to continue serving as flight engineer. The court refused to review the

Board's award and granted TWA summary judgment. Rossi appeals. We affirm.

Awards of the National Railroad Adjustment Board (NRAB) enjoy the same finality as awards of arbitration panels. *Gunther v. San Diego & A.E.R. Co.*, 382 U.S. 257, 263 (1965); *Barrett v. Manufacturers R. Co.*, 453 F.2d 1305, 1307 (8th Cir. 1972). Therefore, whether awards of airline adjustment boards established pursuant to 45 U.S.C. § 184 should be treated like those of private arbitration boards rather than like those of the NRAB is irrelevant in the context of this dispute. Courts will not review the merits of arbitration awards so long as the award is based properly on the applicable collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960).[1] An arbitrator is not confined to the express terms of the contract, however. Where the contract is not explicit, he may apply the "common law of the shop." *Anaconda Co. v. Great Falls Mill & Smeltermen's Union No. 16*, 402 F.2d 749, 752 (9th Cir. 1968).

When the Pilots' Adjustment Board decided that Rossi's discharge was justified, it decided his case on its merits, not on a procedural technicality. Therefore, so long as that decision was based on TWA's collective bargaining agreement, it is not subject to our review.[2]

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[1]See Devita v. Burlington Northern, Inc., 494 F.2d 347, 348 (9th Cir. 1974); Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers Int'l Union, AFL-CIO, 412 F.2d 899, 903 (9th Cir. 1969); San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co., 407 F.2d 1327 (9th Cir. 1969); Anaconda Co. v. Great Falls Mill & Smeltermen's Union No. 16, 402 F.2d 749, 752 (9th Cir. 1968).

[2]The Railway Labor Act provides three statutory bases for judicial reversal of NRAB arbitration awards, none of which permits reexamination of the merits: failure to comply with the Act, lack of jurisdiction and fraud or corruption by a member of the Board. 45 U.S.C. §153 (First) (p), (q).

Rossi argues that the Board had no reasonable basis to decide that his dismissal as flight engineer was justified simply because he failed to achieve promotion to first officer. The arbitration board, drawn from the industry, was better able to make that determination than is this court. The Board may have found that the company's policy of dismissing employees who failed in programs leading to promotion was so well-known and accepted by both union and management as to be part of the "common law" of the TWA agreement. In any event, we cannot require an arbitration board to spell out for our benefit the logical process by which it makes its decision. *Enterprise Wheel,* 363 U.S. at 598. We find no indication in the record that the Board ignored the terms of the collective bargaining agreement—as derived both from its express provisions and from the customary practices of the industry—and dispensed its "own brand of industrial justice." *Id.* at 597.

The court correctly granted summary judgment. Following TWA's motion, supported by affidavits, Rossi failed to support by affidavits any factual allegation necessitating a trial. His affidavit alleging fraud and corruption by the Board in arriving at its decision contained only inadmissible hearsay and was properly disregarded by the trial court. Fed.R.Civ.P. 56(e).

Affirmed.